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ABSTRACT

Focusing on what policymakers cannot do, rather than on what they should do, this booklet explores the constitutional parameters of the teaching of moral values. Section 1 provides a description of the general rules for legal analysis followed by the courts when dealing with freedom of speech or religion. In the following two sections, these rules are applied to decisions to exclude or include value-laden concepts in school programs. The booklet concludes with a discussion of ways in which the public school system can accomodate a diversity of viewpoints about morality and religion and, in particular, ways to accomodate those who disagree with the official choices made for the public education program. A review of constitutional "Do's and Don'ts" for educational policymakers seeking to establish a value system as part of the public school program is appended. (Author/WD)

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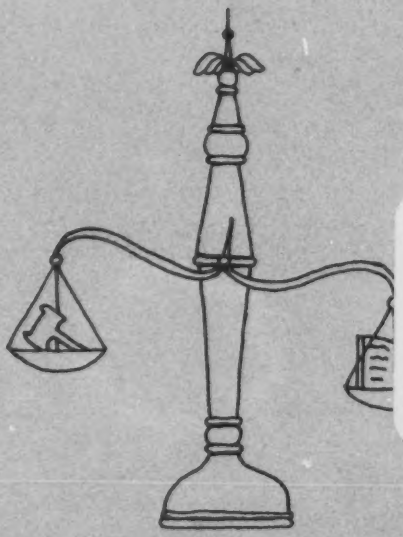

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Religious and Moral Values In Public Schools: A Constitutional Analysis

Report No. LEC-1

by Patricia M. Lines
Law and Education Center

Education Commission of the States
Denver, Colorado

Robert C. Andringa, Executive Director

January 1981

Additional copies of this booklet may be obtained for $2 each from the Law and Education Center, Education Commission of the States, Suite 300, 1860 Lincoln St., Denver, Colorado 80295 (303)830-3639.

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

—The First Amendment to the United States Constitution

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Foreword

This is the first in what will be a series of booklets designed to help education policymakers better understand the legal implications of proposed policy on a number of education issues. The appropriate role of religious and other values in public schools is one of the most controversial of current topics, as evidenced in part by proposed policies at both the state and local levels regarding prayer and other religious observances, scientific creationism, book selection, sex education and values clarification. Some of these proposed policies are of questionable legality for reasons set forth in this booklet, and Pat Lines' discussion and recommendations can help policymakers develop policy in these areas that is consistent with constitutional principles.

With the help of a grant from the Spencer Foundation, the ECS Law and Education Center was established in 1979 to provide preventive legal assistance to states in certain specialty areas. Preventive law, like preventive medicine, is based on the premise that "an ounce of prevention is worth a pound of cure," and it can help avoid or minimize litigation by protecting the rights of students and other parties at the policy formation and implementation stages.

Since it is not possible to know with certainty how the courts will decide all issues, especially those involving new policy, preventive law necessarily involves judgments about how the courts are likely to apply existing legal principles to new factual situations. The recommendations in this booklet are based in part on such judgments by Ms. Lines. They in turn are based on her review and analysis of constitutional principles and analogous case law — review and analysis that can also be used as a basis for readers to reach their own conclusions.

We hope this booklet will prove helpful, and would welcome any comments or suggestions about how future booklets of this kind might be more useful to education policymakers.

Merle Steven McClung
Director
Law and Education Center

Preface

This booklet addresses the constitutional implications of teaching values in the public schools. The booklet consciously avoids more critical aspects of this issue — how to determine which particular set of values should be taught and whether values should be taught at all. These more elementary questions are left to the policy-making process, to citizens in general and to the governors, state legislators and other education policymakers who have the ultimate responsibility for resolving such questions. Yet these are the critical questions and in this preface I would like to step out of my role as lawyer and comment briefly on the broader perspective.

I believe that to the extent that the administration of the public school system in a democratic nation should be responsive to the needs and preferences of citizens, the development of moral responsibility in students is a desirable goal. According to Gallup polls in 1979 and 1980, an overwhelming number of Americans would prefer to see "instruction in the schools that would deal with morals and moral behavior." In both years, 79 percent of those interviewed favored this idea. Among parents of public school children, 84 percent were in favor; 83 percent of parents of parochial school children and 78 percent of those with no children in school also responded favorably.

Further, the public school system, at least for those too poor to afford private schools, compels attendance and attention for a large part of a child's early life. Failure to provide guidance and wisdom along with reading and writing would be to deprive parents of their children for a substantial period of time and then to refuse to accept the responsibility implied by a compulsory education system to be responsive to family needs.

Finally, educators generally seem to agree that the schools have a role to play in this important part of a child's development. The Seven Cardinal Principles developed by a federal education advisory committee in 1918 included at least three principles that strongly relate to the subject: worthy home membership, civic education and ethical character. John Dewey assumed in *Democracy and Education* and in his other works that one of the most important products

of a good education was the development of moral and cultural values. This view has also been expressed by many of this country's founders, such as Thomas Jefferson and Benjamin Franklin.

In addition, some scholars (e.g., William Hazard, in a paper prepared for an ECS advanced leadership program, July 1980) have suggested that a perceived unwillingness by public schools to provide values instruction has contributed to flight from public to private schools, especially to fundamentalist schools. Andrew Oldenquist has posited that the task has sound practical justification as well: the welfare of the entire community is improved where children learn to be honest, fair and willing to work for what they desire (*Harvard Educational Review,* May, 1979).

The idea has its detractors, particularly in some academic circles, but that may stem largely from a conflict in value systems. According to the Gallup poll a majority of Americans want the schools to deal with lack of discipline, drug abuse and similar basic behaviors that tend to make life uncomfortable for everyone. Those who criticize value instruction as "indoctrination" generally advocate teaching of rationality, fairness and liberalism. These are values too, however, and the difference lies chiefly in approach; the values clarificationists such as Sidney Simon and Lawrence Kohlberg would have the student ponder important questions and develop answers on his or her own; traditional approaches would rely on stories and lessons and basic precepts. (The differences are aptly discussed by William Bennet and Edwin Delattre in *The Public Interest,* Winter 1978.) Traditional approaches would tend to rely on the life experiences of past generations that have led to a development of a particular set of values.

Thus, the real issues seem to be the details in selecting the particular value system to be taught, and how to teach it. As how *not* to go about it, as an educational matter, Dewey sharply criticized "lessons 'about morals' " as futile, except for those "social groups where it was a part of the authoritative control of the many by the few." Dewey did not specifically prescribe any particular subject matter or method of instruction that would positively present a sound value system, but in general favored open inquiry and free exchange between student and teacher, and integration of school and community.

As to whose values to teach, education policymakers have the primary responsibility for making this decision. If state policymakers do not provide guidance through laws or regulations, the choices will undoubtedly be made by local school boards, or principals and teachers. It would seem that there is an important role for each level

of government here. States could address the broader aspect of the issue, and local policymakers could focus on how to adapt the broader mandates to local needs and preferences. It is likely, in any case, that education policymakers will find it necessary to face the issue frequently and in depth.

If policymakers desire an existing and developed secular system, the legal system would serve. Many great educators have recognized this function of the law. Horace Mann, for example, when dealing with the specific issue of how to teach patriotic values without espousing a particular political creed, wrote a prescription for the Boston schools that recommended consulting the basic tenets of government on which this country was founded (Twelfth Annual Report of the Board of Education, 1849). The law — particularly in the Bill of Rights and the Post-Civil War amendments to the Constitution — presents a set of values that have been hammered out over the centuries, using a democratic process accepted for such efforts in this country, and so represents an official public view of what is right and wrong.

A simplistic approach may be self-defeating, however. In some cases, for example, the criminal code no longer condemns certain behavior, although the community might nonetheless consider it immoral or unwise. Here, the legal model would suggest an exploration of the question of why not all immoral behavior is illegal, and the greater value of privacy and freedom from governmental interference in private affairs, as reflected in the Bill of Rights and state and federal statutes. To take a specific example that has been debated hotly by educators in recent years, although the machinery of the law is no longer directed at promiscuous sex to the extent it once was, instruction in the wisdom of refraining from such behavior remains feasible using the legal model.

Nor does the legal model require orthodoxy. Even the Bill of Rights can be amended, and instruction in values can take this into account. Personally, I would find it appropriate educationally for high school students to explore an issue such as prayer in the schools, the pros and cons of a prayer amendment, and the process of constitutional change. (As will become evident after the reader examines this booklet, I would also conclude as an attorney that such an exercise would be constitutionally sound.)

There are other approaches to values instruction, of course, and much can be said for and against them. A committee or commission could attempt to develop some basic precepts, or adapt the Seven Cardinal Principals. The legislature itself could specify some basic values to be recognized or taught. Or the decisions could be totally committed to local school officials. Regardless of how education

policymakers approach the issue, the development of a value system in students appears to be a valid and perhaps an unavoidable education goal. Assuming then that the schools will consciously or unconsciously undertake instruction in value systems, the constitutional parameters of the task must be understood. Therefore, this booklet was developed to assist policymakers by outlining the legal implications of their efforts to set a course in this controversial and difficult area.

Executive Summary

This booklet focuses on the teaching of moral values and, because moral values often are founded upon religious beliefs, the handling of religious material in the public schools. The booklet does not attempt to provide advice on whether or how to go about this task — leaving that to the political process and to education policymakers. Rather the booklet explores the constitutional parameters of the issue under the first amendment to the U.S. Constitution. As a result, the primary focus of the booklet is on what policymakers cannot do, rather than on what they should do. There is a wide range of policy decisions about values and public school instruction that would be constitutionally permissible, however, and the booklet is not intended to discourage such efforts. (See the author's preface for an expanded discussion on this subject.)

Education policymakers should not ban materials, ideas or concepts from public schools because of a desire to promote a particular religion, religion in general or nonreligion. Such a purpose violates the mandate in the Constitution that the government shall not establish religion. Thus the Supreme Court in *Epperson v. Arkansas* voided a state law forbidding the teaching of evolution. Requiring the teaching of scientific creationism, *if done in order to accommodate religious views*, would also violate the establishment clause.

Banning material or ideas from the public school environment may also violate the constitutional guaranty of freedom of expression. The Supreme Court regards the public schools as an open forum — a "marketplace of ideas" — where a variety of views should be freely debated. As such, under the Court's first amendment doctrine, school officials must justify an exclusion of an idea or concept by showing an overwhelming or overriding public need, such as the need to maintain order in the classroom. (In *Tinker v. Des Moines School District* the Court held that the Des Moines public schools could not punish students for wearing black armbands in protest of the Vietnam War unless the activity caused "substantial disruption" in school.)

Certain words are beyond the meaning of "speech" as the word is used in the first amendment. This includes obscenity, defamation, words calculated to cause a fight or disturbance, and similar material (such as a false notice that school was closing or falsely shouting

"fire" in a crowded assembly). In such cases, education policymakers have no constitutional obligation to show an overriding concern before banning such "speech." However, the policy itself must narrowly define the material to be banned in order to avoid intruding upon that speech which is constitutionally protected. Therefore, the Court requires a very narrow definition of obscenity in such cases. The Supreme Court has applied this narrow definition to a university publication; lower courts have applied it to high school publications as well, although decisions are not uniform in this area.

Conduct may also be equated with speech if it is highly symbolic, e.g. the wearing of black armbands. Prohibitions on conduct should therefore be designed to avoid incidental restrictions on free expression if it can be done without sacrificing the underlying and valid purpose of a policy.

Failure to include material is closely related to exclusion to material, but failure to include is less vulnerable to constitutional challenge because there is a much greater education need to make such choices when allocating limited resources. If failure to include material could be traced to religious motivation or a desire to suppress a particular point of view, it would violate the Constitution. Normally, however, the failure to include material is based on a desire to select the best curriculum, texts, library books and other materials that money can buy, and courts will not interfere with such decisions.

Education policymakers have almost complete discretion when selecting secular material for the program, but even here problems may arise. Some perfectly valid decisions, such as a requirement that there be a flag salute or other patriotic exercise at the opening of a school day, or sex education as a required course in the curriculum, may transgress the value system of a number students. In *West Virginia v. Barnette,* the Supreme Court upheld the right of Seventh Day Adventists to refrain from a flag salute, and in subsequent cases lower courts have generally required excusal for students with a conscientious objection if the excusal policy would not defeat a major education goal.

Decisions to include material of a religious nature are perhaps the most difficult of all. Under the establishment clause, the Supreme Court requires that valid policies have a secular intent, a secular impact and avoid excessive entanglement between church and state. Under such criteria, a requirement of prayer — even a voluntary prayer or prayer with an excusal policy — violates the constitution, but a requirement of a moment of silence does not necessarily do so, because students could meditate on secular values. Bible study is

unconstitutional if included in the curriculum in order to promote religion, but is valid if objective; that is, if teachers are selected for their academic qualifications rather than religious affiliation, if a variety of views or sources are consulted, and if open and critical discussion is permitted or the focus is historical or cultural. The same can be said for the teaching of scientific creationism.

Specific example of these principles can be found in recent court decisions. The Supreme Court recently voided a Kentucky law requiring the posting of the Ten Commandments in the public schools — a posting that took place without any kind of scholarly inquiry into the subject matter. The Eighth Circuit Court of Appeals (having jurisdiction in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota) recently approved a policy adopted by the Sioux Falls, South Dakota School Board permitting assemblies which in practice included a choir presentation of works such as "Silent Night." Both the Ten Commandments and the holiday assembly cases might have gone another way had the facts been slightly different. Had the Kentucky schools posted the works of Moses along side of the works of Hammurabi, Solon, Justinian and Coke, it would be difficult to see a constitutional establishment of religion. Had the Sioux Falls School District called upon the entire student body to sing carols with religious content, it would be difficult to distinguish the practice from a prayer requirement — something the Supreme Court has found invalid, even if students are excused.

If a school has only a Christmas assembly, it would seem to prefer a particular religion and so be invalid. But where there are assembly programs on holidays, including major holidays of major religions, as well as a discussion of the constitutional right to remain unaffiliated from organized religion, to be agnostic or atheistic, it would be difficult to find any preference for any religious point of view. May 1 (Law Day) would serve well as a day for presenting the latter point of view.

Decisions affecting the educational program should not be made in order to accommodate the religious sensibilities of either a majority or a minority in the community. Establishment of religion includes favoritism to any or all religions. On the other hand, there could be valid secular reasons for policymakers to provide an opportunity for students to learn about the religious views of a cross section of the community, and it should be permissible to provide a secular forum for the presentations of such views, and to include material *about religion* in the program.

Where material that is included for sound secular reasons seriously

offend the conscience of students or teachers, school officials should consider excusal. The courts will require excusal where there is a serious objection based on religious or conscientious ground *and* the excusal does not interfere with an important education goal. (Excusal from a flag salute requirement is required; excusal from a physical education course has not always been required.) This booklet recommends excusal from a course dealing with evolution for those with religious objections.

Finally, education policy should require tolerance for the religious views of students, neither favoring nor disfavoring any view. Where students express personal religious views at appropriate times during class discussion, both constitutional and educational goals would permit teachers to solicit other views, summarize the discussion, explain that he or she must remain neutral in such matters, and discuss briefly the first amendment and its history.

See also the "Do's and Dont's" in the Appendix for a quick reference to the conclusions reached in this booklet.

Introduction

Since its inception, the public school system in the United States has been expected to do much more than simply impart a number of intellectual skills to the children in its care. Most members of the community also desire to see the schools provide moral instruction as one among its many tasks,[1] or at the very least, to support the values that one generation hopes to pass on to the next. Needless to say, where the public school serves a diverse constituency, it will often face conflicts in its implementation of this task. Further, to many minds morality is founded firmly on a religious base and acknowledgment of this base would be highly desirable.

Given this considerable pressure to provide moral instruction, it is not surprising to find the subject included in the curriculum. Even more likely, through conscious or unconscious plans, some sort of value system will work its way into most academic courses, the disciplinary code and extracurricular activities.

School authorities with the temerity openly to approach the task of providing moral instruction face not only education and philosophic dilemmas, but legal issues as well. Constitutional standards do not interfere with the decision to establish moral instruction as part of the program, but they do dictate that such an endeavor be pursued without censoring ideas simply because education policymakers find them objectionable, and the task must be done without discouraging or encouraging religious views.

Judging from the extent of litigation against education policymakers in this arena, major problems can arise where the policymakers seek to include subjects in the curriculum that offend the religious beliefs or sensibilities of any group of individuals in the community (such as the teaching of sex education). For many years schools have been plagued with legal problems concerning the handling of sexually-oriented material in libraries and textbooks; some districts have attempted censorship of such materials only to be reversed by the courts. The inclusion of materials with religious significance, such as the Bible or excerpts from it, has also been the subject of litigation since the 1850s to the present day. Most recently, state laws requiring the posting of the Ten Commandments in the schools of North Dakota and Kentucky have faced court challenge. Prayer in the schools is another perennial issue. Most nota-

bly, the Massachusetts Legislature recently attempted a voluntary prayer requirement, which was soon voided by its own supreme court. In Louisiana, a lower court has upheld a similar requirement, but an appeal is pending.

Instruction in the origins of human beings remains a difficult question, with moral implications for some religious groups. Today, the issue sometimes takes the form of fundamentalist religious groups advocating the teaching of "scientific creationism" in science classes. Others would like to see the account in Genesis presented. While the Supreme Court has recognized the propriety of studying topics of religious significance, including the Bible for example, the Court* has indicated that such study must be objective. Moreover, in science and many other disciplines taught in the school, objective and critical inquiry into any set of ideas is encouraged, while fundamentalists believe some ideas are a matter of faith and beyond questioning. Such conflicts in substantive and didactic views suggest that the resolution of the issue will be far from easy. In many cases, education officials may have to concentrate on accommodating the views and practices of those who have strong objections to the policy choices made when educators determine to present value-laden ideas or moral instruction in the public school program.

This booklet focuses on the legal boundaries that must be observed when handling religious and moral values in the public schools. The primary focus will be on the relevant constitutional parameters of the task. Section I provides a description of the general rules for legal analysis followed by the courts when dealing with freedom of speech or religion. In Sections II (Problems of Exclusion) and III (Problems of Inclusion) these rules are applied to decisions to exclude or include value-laden concepts in the program. The booklet concludes with a discussion of ways in which the public school system can accommodate a diversity of viewpoints about morality and religion, and in particular, ways to accommodate those who disagree with the official choices made for the public education program.

In addition, the prefatory material to this booklet contains an Executive Summary, and the Appendix contains a review of Constitutional "Do's and Don'ts" for education policymakers seeking to establish a value system as part of the public school program. The "Do's and Don'ts" in the Appendix also serve as an index to the substantive discussions, allowing a hurried reader to zero in on a particular problem without reading the entire booklet.

*Throughout this booklet, "Court" denotes the Supreme Court, while "court" refers to any lower court, following the *Uniform System of Citation (12th ed., 1976)*.

I. The Legal Framework

Free Expression — Judicial Treatment

The presentation of moral principles, as well as ideas that may be inimical to such principles, usually depends upon written or spoken expression. The expression of ideas, whether considered moral or immoral, religious or sacrilegious, good or bad, are protected by the first amendment. The first amendment, when read with the fourteenth, prohibits all levels of government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." To this, the Supreme Court has added a judicial gloss deemed necessary for practical reasons: only *unjustifiable* prohibitions of the protected right violate the constitution. Thus, an analysis of inclusion or exclusion of ideas in the curriculum must include not only a determination of whether a protected right is in fact abridged, but also whether the abridgment can be justified.

What Is Speech Protected by the First Amendment?

On the question of whether a right to free expression is abridged, the Court has traditionally recognized that certain categories of verbal utterances are not really protected at all. Falsely shouting "fire" in a crowded theater[2] and similar utterances that do not serve to communicate ideas are not viewed as "speech" to be protected under the first amendment.[3] As such, these unprotected verbalizations may be prohibited on the same basis as conduct and there is no first amendment problem in doing so. However, the Court has adopted technical rules for the drafting of such policies, to assure that the policy does not also circumscribe protected speech or conduct that is the equivalent of speech. That is, the Court will invalidate any policy which "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press."[4] This rule against overbreadth in an official policy has induced the Supreme Court to recommend specific narrow and technical definitions of unprotected verbalization. For example, the Court has spelled out some precise definitions for such concepts as obscenity and defamation,[5] to assure that legal prohibitions on them do not extend to protected expression.

On the other hand, symbols and symbolic conduct may qualify as protected expression, as is made clear in *Tinker v. Des Moines School District* — involving black armbands worn by public school

students protesting the Vietnam War. The Supreme Court characterized this nonverbal display as "closely akin to pure speech," and deserving all the protection normally accorded to the highest forms of verbal communication.[6] But the inquiry does not end with a determination that protected expression is at stake.

What Justifies Limitations on Expressions?

Assuming that a policy restricts protected expression, the possibility of justification enters the equation. Although there are arguments to the contrary — most notably those advocated by Justice Hugo Black[7] — the right to free expression is not absolute. Although the Court's "test" to determine whether a restraint on speech is justified has changed over the years,[8] today it could be described as a balancing test[9] weighted in favor of individual rights: the government must justify policies restrictive of free expression by some "compelling" or "overwhelming" interest or concern.[10] To illustrate how this "test" operates in a school setting, the best starting point is *Tinker,*[11] dealing with criteria for permissible restraints on students' free expression. School authorities in Des Moines, Iowa suspended Mary Beth and John Tinker who were opposed to the war in Vietnam, for violating a rule against the wearing of armbands on public school premises. The Court acknowledged that school officials could legally impose restraints on free expression, but only where they were able

> . . . to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained . . . .[12]

In *Tinker* no such showing had been made although the district court had concluded that school authorities reasonably *feared* a disturbance due to the wearing of the armbands. The Supreme Court found that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[13]

According to the Court, the public school environment is one that must accommodate diversity in views, so long as the expression of these views is achieved in an orderly fashion:

> The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing

> field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfering with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others . . . . But conduct by the student, in class or out of it, which for any reason — whether it stems from time, place, or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others, is of course, not immunized by the constitutional guarantee of freedom of speech.[14]

This requirement that the government have some overriding justification before limiting the free expression rights of its subjects also applies when school authorities wish to compel some form of expression, rather than prohibit it. For example, the Court has held that the state has little interest in forcing pupils to participate in certain patriotic activites, such as a flag salute or a pledge of allegiance. In *West Virginia State Board of Education v. Barnette,* the Court struck down a policy conditioning school attendance upon a daily salute of the flag.[15] The Court held that such a practice "transcends constitutional limitations and . . . invades the sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control."[16] The Court stressed that a compulsory flag salute "compels a belief and an attitude of mind,"[17] a practice that is outlawed by the free expression clause. The Court, applying the test prevalent at the time, ruled that such a policy cannot be upheld unless it can be justified by a "clear and present danger."[18] To do otherwise would be to compel a person "to utter what is not in his mind."[19] Although the plaintiffs in *Barnette* also objected to the flag salute as an infringement on their religious beliefs (they were Jehovah's Witnesses), the Supreme Court based its ruling on the right to free expression. Subsequent litigation has broadened the Court's ruling to include nonreligious objection as well as to expand permissible modes of nonparticipation, extending it to students and teachers, to a right to remain seated during a ceremony, to persons objecting on grounds of conscience rather than religion *per se,* and to similar mutations of the problem.[20]

These general constitutional standards control decisions affecting instruction in moral principles, and in particular policy decisions concerning what materials may be presented and what materials may be prohibited or censored in a public school system. As will be seen when these principals are applied to specific problems, school officials must not make program decisions based on a desire to suppress unpopular views or on personal judgments about good taste or decency. Justification based on such idiosyncratic views or feelings would, without more, be inadequate to override first amendment rights to free expression. Policy decisions about school programs should be based on an assessment of education need, determined

with an effort to include diversity in views and with acceptance of criticism of the principles to be taught. Restrictions on unpopular views presented by participants in the public school system must be justified by some overriding concern, such as the need to maintain order in the classroom or the need to specify course content,[21] and even then such a need may only justify restrictions as to time, place and manner of presenting the conflicting view.

Intent, Effect and Incidental Restrictions on Free Expression

When courts assess a policy to determine whether it violates the speech clause of the first amendment, they look for *both* unlawful *intent and* unlawful *impact* on free speech rights. Of course, a statute or policy aimed directly at free expression can be assumed to inhibit expression and have a repressive impact. On the other hand, a severe impact on first amendment rights, along with other circumstances, could establish unlawful intent.[22] In *Tinker*, the timing of the rule, feelings about the Vietnam war and similar circumstances made it unnecessary for the Supreme Court to discuss intent in any detail.[23] It was clearly understood that the Des Moines policy was aimed at the suppression of expression.

Judicial analysis will be different for education policy aimed at conduct rather than expression, but it must be recognized that sometimes these policies will have an incidental effect on expression. The test for incidental restrictions on speech was explained most clearly in a nonschool case, *United States v O'Brien*.[24] O'Brien burned his draft card in protest of the Vietnam War and was convicted for failure to carry the card as required by federal law. The Court upheld the federal policy, observing that the government had not prohibited protest of the draft or the war, and had not even prohibited symbolic conduct, but had required that the draft card be retained and carried on the person for reasons unrelated to free expression. Under such circumstances, the Court did not require a compelling justification for the policy, explaining this deviation from the general rule (described above) as follows:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" wherever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify limitations of First Amendment freedoms. To characterize the nature of the governmental interest that must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinate; paramount; cogent;

> strong. Whatever imprecision inheres in these terms we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment . . . meets all of these requirements. . . ."[25]

In other words, where the policy in question is not intended to restrict expression, it is usually valid under the first amendment. However, since concern for free expression is of the highest order, even such legislation will be reviewed by the Court to determine whether any "incidental" conflicts between the goals of the legislation and the first amendment can be resolved. The need for justification remains: there must be an "important or substantial" government interest in pursuing the policy. The need to accommodate those individuals desiring to exercise their right to free expression also remains. The policy must avoid incidental restrictions on first amendment rights if it is at all possible to do so without interfering with the underlying goal of the policy. Finally, the rule against overbreadth remains — the policy must go no further than necessary in order to avoid these incidental and unintended restrictions on free speech.

It seems appropriate to consult this test when examining school regulations aimed at conduct. The *O'Brien* test has been applied, for example, to cases such as those involving a school grooming code, although some courts have found the government interest too insubstantial while others disagree.[26]

Excusal

Although a policy is not aimed at speech and is valid, there may be a constitutional requirement, in certain circumstances, that authorities accommodate dissenters. The Court has required excusal from an otherwise valid requirement where an individual has strong views towards a subject and the application of a policy would offend that individual's freedom of expression (which includes the right to remain silent). In *Barnette* — the flag salute case discussed previously — the Court invalidated West Virginia's enforcement of a flag salute requirement against Jehovah's Witnesses. Lower court interpretation of *Barnette* has extended the requirement to teachers and students who conscientiously object to a flag salute or pledge, or similar observance, be excused.[27] There is nothing intrinsically "wrong" with a flag salute requirement, it simply cannot be enforced against those who wish to abstain for reasons of conscience.

Religion — Judicial Treatment

Since moral principles are often derived from a religious base, efforts to include these in the educational program may also pose some serious constitutional conflicts with the religion clause of the first amendment. This subsection discusses the "tests" adopted for the Court when analyzing potential conflicts with the religion clause of the first amendment.

The constitutional guarantee of freedom of religion is more complex than the guarantee of free expression. The speech clause simply forbids government repression, but the religion clause prohibits both repression and support: "Congress shall make no law respecting[28] an establishment of religion, or prohibiting the free exercise thereof. . . ." These two constitutional mandates create a "tightrope"[29] for education policymakers when they deal with issues that touch upon religion. An effort by education policymakers to openly acknowledge a religious basis for any school requirement (even a secular requirement) or to include a particular subject of study for religious reasons is an unconstitutional establishment of religion. At the same time to deny the contribution of religion to the development of certain concepts or to forbid students from expressing religious views at appropriate times is hostile to religion, and should be viewed as a violation of the right to free exercise of religion by students or teachers.

Free Exercise of Religion

It would, of course, violate the free exercise clause to forbid or restrict private prayer or other religious observances, but such a direct attack on religion has fortunately not been attempted in this country. By far the most numerous types of free exercise case to come before the Court are those involving *unintended* restrictions on free exercise of religion. That is, a legislature or other official body was seeking to restrict or limit a given behavior for reasons unrelated to religious practice. Where the Court has considered such "incidental" burdens on religious exercise, it has not voided the law. If relief seems warranted, the Court has restricted the law's application by requiring excusal.[30] This is required if the law poses a serious barrier to free exercise of religion[31] and the excusal would not seriously interfere with the legitimate secular goals of the law.[32] For example, excusal has been required from laws relating to jury duty,[33] restrictions on drug use,[34] work requirements in unemployment compensation programs[35] and compulsory education.[36] It has not been required in laws banning polygamy[37] or requiring vaccination from disease.[38] As will be discussed below, excusal in the school setting may be constitutionally necessary where instruction in a secular

subject (such as sex education or evolution) would seriously conflict with a student's religious beliefs.

Establishment of Religion

The Court has taken a somewhat different approach to the task of interpreting the establishment clause. Recognizing that it is modified by the free exercise clause, and that complete avoidance of religious references could be viewed as suppressive and could discourage religious practices, the Court has interpreted the establishment clause to require official neutrality — neither support for nor hositility to religion. To determine whether this requisite neutrality exists, the Court has established a three-part "test." Under it, the Court has said it will uphold a policy "if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion."[39]

Further, the Court will void a law if it has *either* (1) the prohibited effect *or* (2) the prohibited intent *or* (3) the prohibited entanglement.[40] Even with this strict "three-pronged test," the first amendment does not prohibit support to religious bodies or religious individuals; rather, it prohibits *establishment* of religion. Neutral programs, such as fire and safety protection, are extended to individuals and organizations regardless of their religion.[41] Even direct grants[42] and tax exemptions[43] to religious organizations, although they may greatly aid them financially, have been upheld. Of course they must be carefully designed to meet Court standards. Some private school aid programs, including those that involve a transfer of substantial sums of money to sectarian schools, have also been upheld.[44]

This three-part "test" is not an easy one to apply to decisions affecting public school program and it is frequently criticized in the legal literature. As is often the case with these Court-developed "tests," it may be modified by the Court gradually, or in one important decision, at a future date. The *intent* of school policymakers seems to be the most solid part of the "test," perhaps because the second part — impact — is too difficult to predict or control. The study of physics, although undertaken without any exposure to religious values, could inspire many students to an awe of the universe and ultimately to a religious notion about its creation. Conversely, the study of the history of the church could lead students to reject religions once embraced. The Court's early references to the third prong of this "test" — entanglement — arose because the Court had observed that a *failure* to support religious institutions (a failure to extend tax exemptions to churches) could be as excessively entangling as the grant of a tax exemption.[45] The Court feared the resemblance to

religious prosecution of liens, property foreclosures and similar actions accompanying nonpayment of a tax.[46] Subsequently, however, the Court voided certain aid programs to private schools because of entangling provisions in the program.[47] Entanglement probably is relevant to curricular decisions to the extent that it forbids a program in which it may become necessary for education policymakers to make choices that favor or disfavor religious views. It is, in effect, insurance against violation of the requirements of neutrality and primary secular purpose. Otherwise, the entanglement test can easily become a tool in the censor's hand: it could be converted to a requirement that complexity in thought or intimacy with religious ideas, standing alone, would be grounds for eliminating books or ideas from the public school curriculum.

Although there is much debate on this issue among legal scholars, it would seem that the most relevant of the three parts of the "test" is intent, where the issue focuses on what to include or exclude from a public school program. Where the foreseeable *impact* of policymakers' choices will be to encourage or discourage religion, or where the policy appears to favor or disfavor a particular religion, religion in general or nonreligion (the entanglement criteria), the courts could consider this as evidence of unconstitutional intent. In applying this "test," books having a religious origin could be included for their literary, historical or philosophical value. Atheistic essays would be acceptable on the same basis. It would be appropriate for a school choir to attempt the "Messiah" (or, as will be discussed later, "Silent Night") given the aesthetic value of the work, art students would be allowed to examine DaVinci's cartoon of the Virgin and Child, and the Golden Rule could appear on a teacher's blackboard. Such a result is consistent with Supreme Court decisions, and to purge such materials would be hostile to religion[48] — a violation of both the establishment clause and, if any students are then led to believe that religion is "bad," a violation of the free exercise clause.

In short, the constitutional mandate requires an even-handed, sensible approach to religion. As Mr. Justice Douglas has observed:

> The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. . . . Otherwise the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. . . .
>
> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necesary. We sponsor an attitude on the part of govern-

ment that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.[49]

II. Treatment of Immoral or Sacrilegious Concepts: Problems of Exclusion and Refusal to Include

Adults who wish to inculcate moral values in children may seek to shelter those children from the less savory aspects of the adult world. It is entirely natural, therfore, that policymakers experience considerable pressure from parents and others to exclude from the educational program concepts considered immoral or in conflict with particular religious views.

Exclusion for Religious Reasons

A discussion of exclusion of ideas from the educational program for religious reasons must begin with *Epperson v. Arkansas*[50] dealing with a so-called "monkey law." Susan Epperson, a 10th grade biology teacher in the Little Rock public school system, received a supply of new biology texts, selected through official processes. The book included a chapter on Darwinian evolution. She apparently desired to use the book and to include the chapter on evolution in her course. However, a new state law prohibited the teaching of any "theory or doctrine that mankind ascended or descended from a lower order of animals," and further prohibited the adoption or use of any textbook that did so.[51] Epperson sought an injunction against enforcement of the law, but the state supreme court in a brief *per curiam* opinion, held that the law was a "valid exercise of the state's power to specify the curriculum in its public schools."[52] She then defied the law, taught the prohibited chapter and was dismissed.

On appeal, the Supreme Court voided the state law because it favored a particular religious view —

> Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.[53]

The Court applied a simple "test" of neutrality —

> Government in our democracy . . . must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.[54]

In short, exclusion of concepts to accommodate the religious view of one or many individuals will be an unconstitutional establishment of religion. There may be many reasons for removal of concepts or subjects from the curriculum, however, and proof of motive may be difficult. Further, the presumption is probably in favor of school authorities, absent any special circumstances tending to show an improper motive.[55] This point was stressed by Mr. Justice Black in his concurring opinion in *Epperson:*

> It is plain that a state law prohibiting all teaching of human development or biology is constitutionally quite different from a law that compels a teacher to teach as true only one theroy of a given doctrine. It would be difficult to make a First Amendment case out of a state law eliminating the subject of higher mathematics, or astronomy, or biology from its curriculum. . . . [T]here is no reason . . . why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools.[56]

Legal authorities who have examined the issues raised in *Epperson* also believe it permissible to eliminate Darwinian theory from the curriculum, if the decision is based on education reasons unrelated to a decision to accommodate religious views.[57]

An interesting question emerges: why did the Court in *Epperson* pay so little attention to the tenuousness of the evidence of legislative purpose? On its face the law purported to be a neutral regulation of curriculum content. The Court cited a prior law from another state (Tennessee) which had made explicit references to "Divine Creation of men as taught in the Bible" (the law in question in the celebrated *Scopes* case), and concluded that the Arkansas law was intended to further the same invalid purpose.[58]

Justice Black in his concurring opinion criticized this failure to require better evidence of improper motive, and argued in favor of using an alternative ground for invalidating the statute.[59] Perhaps the explanation for the Court's treatment of the evidence lies with the very formal status of state legislators with respect to public education. It is unusual in our system of public education for the state legislature to specify in any detail the content of course materials,[60] and so any such specification may raise questions as to motive.

Exclusion for Secular Reasons

Obscenity

Decisions to exclude objectionable materials from the educational program are more usually based upon secularized attitudes toward morality. Even where such policies can be traced to religious origins, as is often the case, the Court has recognized their primary secular purpose and has upheld them.[61] Thus, the banning of mate-

rial considered immoral by a state legislature or school board can be for secular purposes and raise no potential conflict with the *religion* clause. However, serious constitutional issues under the speech clause can nonetheless arise. The case of obscenity provides a prime example.

The rule against overbreadth in a policy affecting speech has been discussed above in Section I. Generally a policy of eliminating obscene materials must be narrowly drawn to avoid restrictions on protected speech. The Court's current recommendation for a sufficiently narrow definition of obscenity is found in *Miller v. California,* holding that the state's power to censor obscenity depends upon

> . . . (a) whether "the average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct, specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[62]

Although it was developed in the context of laws banning certain books and movies offered to adults, this definition is often consulted in cases dealing with public school programs and student discipline.

Student-Initiated Publications

The Supreme Court has applied this definition to education policy decisions in a case dealing with college students. In *Papish v. Board of Curators*[63] a student was expelled after distributing on campus, without disruption, an underground newspaper containing a political cartoon showing policemen raping the Statue of Liberty, accompanied by an article entitled "Mother Fucker Acquitted." A federal district court upheld the expulsion, finding the paper obscene; the court of appeals affirmed, finding it unnecessary to deal with the issue of obscenity, because "on a university campus 'freedom of expression' could properly be 'subordinated to other interest such as, for example, the conventions of decency. . . ."[64] The Supreme Court reversed:

> . . . the mere dissemination of ideas — no matter how offensive to good taste — on a state university campus may not be shut off in the name of "conventions of decency." Other recent precedents of this court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labelled as constitutionally obscene or otherwise protected.[65]

It is generally recognized that the constitutional standard may be more flexible where minors are concerned.[66] In addition, the required application of "contemporary community standards" takes

into consideration the fact that children are in the audience.[67] But the Court has also held in a case dealing with adult literature, that children are not part of the relevant community setting the standards.[68]

Despite this acceptance of the idea of a sterner rule against obscenity aimed at minors, high school students have nonetheless prevailed in many of the cases dealing with allegedly obscene material produced by the student, often in a student "underground" or unauthorized newspaper.[69]

School-sponsored Publications

Although school-sponsored publications are on a different footing,[70] some courts have also applied the narrow definition of obscenity to them.[71] Here, however, there may be other reasons for not including material, such as reader interest, good journalism, or educational value. When material is simply not accepted for publication for these reasons, no issue of potential censorship arises, absent other circumstances. Such circumstances may include departures from the usual method for accepting material, acceptance and subsequent withdrawal, or presentation of one view but refusal to present the opposite view.

School Libraries

Censorship may also strike at school libraries. Like libraries in general, those found in schools play an important part in our system of free expression, and decisions affecting the library collection should carefully follow the spirit as well as the specific requirements of the first amendment.

It should be recognized, however, that the courts have treated removal of books from school libraries differently in different jurisdictions. One school of judicial thought, represented chiefly by the U.S. Court of Appeals for the Seventh Circuit (having jurisdiction over federal appeals in Illinois, Indiana, and Wisconsin), holds that education policymakers have authority to control the contents of school libraries and refuses to see a first amendment problem. In *Zykan v. Warsaw Community School Corporation*,[72] dealing primarily with a series of decisions affecting curriculum, text selection and staffing, the seventh circuit also considered the removal of a single book from the school library (one that had also been eliminated as a text from a course, prior to cancellation of the course). School officials maintained that the book was checked out for use in some of the ensuing litigation. Plaintiff's complaint, which was the only thing under review, alleged that the book had been permanently removed. Taking

the complaint as true, as is required in cases dealing with the adequacy of a complaint, the appeals court upheld school authorities. Unfortunately, the court treated this aspect of the case as a minor matter and did not carefully analyze the implications of the removal. Instead the court cited some rather shaky precedents, including *Pico v. Board of Education*,[73] a case that has subsequently been reversed by the second circuit (with jurisdiction in Connecticut, New York and Vermont),[74] and *Presidents v. Community School Board*,[75] a case that dealt not with the removal of a book, but with the classification of a book as available only through a parent. It also cited *Bicknell v. Vergennes Union High School Board*,[76] another case where a court also relied on *Presidents Council* without carefully examining the facts. However, in light of the seriousness of the facts alleged in the complaint, the seventh circuit instructed the trial court to permit plaintiffs to amend the complaint (for a third time). The court in *Zykan* expected plaintiffs to allege that they were unable to obtain the book elsewhere. ("Nor can school authorities prohibit students from buying or reading a particular book or, under most circumstances, from bringing it to school and discussing it there. But no such allegations appear in plaintiffs' pleading....")[77]

Another group of cases focuses on the role of the school library in the "marketplace of ideas"[78] and permits removal only if there is a compelling justification. Removal alone led the sixth circuit (with jurisdiction in Kentucky, Michigan, Ohio and Tennessee) in *Minarcini v. Strongsville City School District* to conclude that censorship of ideas was the underlying motive:

> In the absence of any explanation of the Board's action which is neutral in First Amendment terms, we must conclude that the School Board removed the books because it found them objectionable in content and because it felt that it had the power, unfettered by the First Amendment, to censor the school library for subject matter which the Board members found distasteful.[79]

School officials had directed that Joseph Heller's *Catch 22* and Kurt Vonnegut's *Cat's Cradle* be removed from the library. The court ordered the school board to replace the removed books, even if this meant purchasing them out of the first available library funds.

In *Right to Read Defense Committee of Chelsea v. School Committee*[80] a Massachusetts federal district court was faced with a challenge to a board decision to remove from the library a book authored by children. On the eve of trial, the Committee adopted a formal resolution stating that it had removed the book because it dealt with "sex education," which was "not a school subject." The court was not impressed by the resolution, dismissing it as "self-serving" and found the decision had rested solely on the basis of objection to earthy language contained in a single poem (the board did not

examine the remainder of the book).[81] The court held that the board could not constitutionally remove the material, indicating a fear of the precedent that such an action could entail.[82]

Even if one accepts this latter set of cases as stating the correct view, as was true of student newsletters and similar material, truly obscene materials that inadvertently find their way into school libraries can be removed without need to offer any compelling justification for doing so. Once again, however, the technical definition of obscenity should be applied.[83] A number of states have attempted to tie school policy on texts and library books to the definition of obscenity found in the state's civil or criminal code. This is legally sound, provided the code meets the Supreme Court standards for precision (and preferably has been court tested), and the school policy follows the model exactly. For example, in 1975 the New Hampshire legislature had under consideration a bill to forbid the use in public schools of any book or educational material containing language judged obscene as defined in the state's criminal code.[84] In an advisory opinion, the state supreme court found the bill of questionable constitutionality, because it would proscribe the reading of any book or material solely because a portion was obscene, without considering whether "taken as a whole," the book appealed to prurient interests and lacked serious value.

On the other hand, at the request of families objecting to their use, an Ohio lower court found *Manchild in the Promised Land* and *One Flew Over the Cuckoo's Nest* to be obscene within the definition of an obscenity statute dealing with materials for children in school.[85] The court found that "[t]he portrayals as made by the authors themselves were never intended or designed for use as textbooks. They have no literary, artistic, political, or scientific value whatsoever."[86] This reasoning, applied to the study of literature where a variety of books not intended as texts are typically presented, is obviously faulty. Further, the statutory definition of obscenity was plainly overbroad, banning, for example "a display, description, or representation of . . . nudity,"[87] and therefore extended to many classic and scientific works. A better explanation of the case (one the court discussed but did not use as a linchpin) is that the statute did not actually ban the literature, but restricted it to use by students who had parental consent to read it.[88]

In any case courts will examine the motives for removing books from the library, and will usually apply the technical definition of obscenity where books are to be removed because they are judged obscene. In the context of school libraries, feelings about good taste seem totally insufficient to justify a decision to censor free expression of ideas. On the other hand, a decision based on reasons unrelated to

the message conveyed by the material — lack of reader interest, budget, desire to eliminate dated material and so forth — ought to be upheld.[89]

The abrupt removal of books or other materials from library shelves should arouse a strong suspicion that school authorities disagreed with content. While there may be many legitimate reasons for not selecting specific books, once selected, removal of books should raise many questions. Since libraries generally seek to have a large and varied collection of books, removal is an atypical action, except where space becomes a problem, and then generally only books in little demand or containing dated material are removed.

Restriction Rather Than Removal

One way of handling sensitive library materials — those that education policymakers recognize as presenting ideas which parents might find offensive or vulgar or objectionable on religious or moral grounds — would be to make student access to the material dependent on parental consent. A number of courts have upheld this approach.[90] No contrary decision has been located — one in which a court found the use of a restricted access shelf to be unconstitutional. The basic approach appears harmonious with Supreme Court decisions. Essentially the censorship decision, if any is made at all, is made by the parents of an individual child, and not the schools. This is also harmonious with the general concept of excusal for a child where a family has religious or conscientious objections to particular aspects of a school program, discussed elsewhere in this booklet. It is not harmonious with Court cases upholding constitutional rights of minors to make certain decisions without parental consent, such as decisions to seek birth control advice or obtain an abortion.

Curriculum and Course Content

Decisions affecting curriculum and texts of necessity involve change — routine elimination of nonessential or unsuccessful course offerings and updating and replacement of texts. It would be logical to require students who object to a decision to eliminate texts or courses to meet a higher threshold in their allegations before the courts recognize a potential first amendment issue. Thus, a decision to eliminate a sex education course was not questioned by a federal court in Michigan.[91] *Zykan v. Warsaw Community School Corporation* (discussed previously because of the removal of a library book) focused primarily on a series of curricular and related decisions. School officials had refused to renew contracts of teachers of certain courses, and had cancelled the courses (Value Clarification, Women

in Literature, Black Literature, Gothic Literature, Folklore and Legends, Shakespeare, Science Fiction and Creative Writing). Prior to these events the teacher of the "Women in Literature" course was ordered to drop *Go Ask Alice, The Bell Jar* and *The Stepford Wives* and was told not to pursue plans to add *Growing up Female in America* as a text for the course. Plaintiffs alleged that these actions were taken because "particular words in the books offended [school officials']. . . social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value. . . ." Similar allegations were made with respect to the decision to cancel the courses and to refuse to renew the contracts of the teachers.

The court concluded,

> Plaintiff's complaint does not state a violation of constitutional rights and therefore is not cognizable in federal court . . . . This conclusion stems from a careful consideration of the competing interests presented by a complaint charging infringement of student's academic freedom. . . .
>
> First Amendment guarantees are sufficiently broad to provide some protection for what has been called "academic freedom," which recognizes the importance to the scholarly and academic communities of being free from ideological coercion. . . . Less clear are the precise contours of this constitutionally protected academic freedom, and particularly its appropriate role when the concern is not the rarified atmosphere of the college or university, but rather the heartier environment of the secondary school.
>
> . . . [T]wo factors tend to limit the relevance of "academic freedom" at the secondary school level. First, the student's right to and need for such freedom is bounded by the level of his or her intellectual development. A high school student's lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas engenders a correspondingly greater need for direction and guidance from those better equipped by experience and reflection to make critical educational choices. Second, the importance of secondary schools in the development of intellectual faculties is only one part of a broad formative role encompassing the encouragement and nurturing of those fundamental social, political, and moral values that will permit a student to take his place in the community. . . .
>
> The need for intellectual and moral guidance from a body capable of transmitting the mores of the community has led most state legislatures to lodge primary responsibility for secondary school education in local school boards, which generally have considerable authority to regulate the specifics of the classroom.[92]

The court quoted the Supreme Court in *Epperson v. Arkansas* on this point. ("Public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate

basic constitutional values."[93]) The seventh circuit concluded that "it is in general permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views."[94]

While the seventh circuit is correct, so far as its opinion goes on this point, it is not permissible to base curricular decisions on religious doctrine, whether the favored doctrine is one adhered to by a school board or anyone else. This was the Supreme Court's holding in *Epperson*. Apparently fundamentalist religious groups had brought pressure on the board to purge the school program of "smut"[95] in *Zykan*, and it is unfortunate that there was inadequate language in the complaint to raise this issue.

The seventh circuit acknowledged the possibility that the curricular decisions could be unconstitutional, given a slightly different set of allegations: "The amended complaint nowhere suggests that in taking these actions defendants have been guided by an interest in imposing some religious or scientific orthodoxy or a desire to eliminate a particular kind of inquiry generally." (One might wonder what constitutes "scientific orthodoxy," if one believes science follows rules of open inquiry. Probably the court simply meant "non-religious orthodoxy.") The court's next passage helps to define the parameters of "orthodoxy:"

> Noticeably absent from the amended complaint is any hint that the decisions of these administrators flow from some rigid and uniform view of the sort the Constitution makes unacceptable as a basis for educational decision-making or from some systematic effort to exclude a particular type of thought, or even from some identifiable ideological preference. Plaintiffs have also not alleged that the Board's decisions have deprived them of all contact with the material in question by, for example, forbidding students to have or to read the materials or making them wholly unavailable to them from other sources.[96]

The concept of "rigid and uniform" ideas as opposed to other ideas seems to be a rather difficult distinction to apply. Where a decision amounts to censorship, or elimination of a particular author's presentation, there is no basis in Supreme Court decisions in the area to support the distinction. So long as the board is motivated by education concerns (as the seventh circuit concluded in *Zykan*) the decision was not a censorship decision.

The seventh circuit viewed the board's decision as one involving design of the program. Students were not forbidden to read the books. The board was complying with a state law requiring a periodic review of texts. Moreover, the cancelled courses had been initiated on an experimental basis.

As for the allegations concerning the teacher dismissals, the court observed that the case before it, which was brought by students, was not the right one. The "associational interests" of students do not extend to "a right to be taught in the classroom by that instructor or in accordance with that teacher's own sense of the best material."[97]

The bottom line in *Zykan* is the court's direction to the trial court to grant the plaintiff leave to file a third amended complaint. In short, plaintiff could attempt to reassess the facts and coach them in language suggestive of a valid constitutional theory. According to plaintiffs' attorney, however, this invitation to amend the complaint will be declined.

A Summary of Problems With Exclusion

Where the material to be excluded is beyond the protection of the first amendment, as is the case with obscenity, it can be excluded without further analysis. However, it is important that the material clearly be obscene, following a legally adequate definition of obscenity (or fit within the definition of some other unprotected category), and the policy governing the exclusion must be narrowly drawn. There must be a compelling or overriding justification for exclusion of any other material; that is, any material that is a vehicle for communication of ideas. Generally a policymaker's judgments about good taste and propriety have been held inadequate to justify exclusion of ideas.

Failure to Include

The failure to include material is a somewhat different matter, particularly where the school system must pay for the material. Considerations of budget will dictate that the system get the best money can buy, and some books and other materials will be preferred over others. Were a refusal to include material based upon those same idiosyncratic views towards an idea, however, then such refusal would be on the same legal footing as exclusion. For example, in *Loewen v. Turnipseed*[98] a court had to consider a decision by Mississippi's state rating committee to place only one text on its list of acceptable state history texts — a decision that made only one text eligible for free distribution to public and private schools. The only other candidate for inclusion, *Mississippi, Conflict and Change,* presented a controversial view of the civil war and slavery, while the accepted text tended to present a benign view of these subjects. The state's decision was found to violate the first amendment rights of students and teachers to have access to the view presented, and of the authors (who also sued) to communicate this view. The judge found that the legislative history surrounding the creation of the

committee in 1960 revealed "an intent . . . to eliminate allegedly controversial material from the schools' curriculum, and to insure that only the views of those in authority would be communicated to school children."[99] The judge also found an intent to perpetrate certain ideas about segregation and discrimination.[100] Evidence of this discriminatory intent was based on legislative history,[101] the fact that only two texts were under consideration,[102] and an evaluation of the text based on the rating committee's criteria.[103]

Loewen v. Turnipseed is an unusual case because the court was able to find evidence of an intent to censor ideas in a decision to refuse to include a book. Proof in such cases is ordinarily more difficult because of the need to make decisions that incidentally eliminate some materials from the program.

Failure to include also may be questioned with relative ease where students themselves initiate discussion of a particular book or concept. Assuming students obtain the material themselves and initiate discussion at appropriate times, education policymakers would have difficulty justifying a ban on either reading or discussing the material. If the material is not obscene or otherwise unprotected under the first amendment (under the legal definition), the best course of action should be to permit discussion and to discuss those aspects of the material that may be considered immoral or unwise, in bad taste or vulgar, and the reasons for such judgments.

III. Presentation of Moral Concepts: Problems of Inclusion

The preceding discussion focuses on the legal problems that may arise where students, parents or others object to a decision by school authorities to exclude (or fail to include) material because officials find the material offensive. Sometimes the shoe is on the other foot: education policymakers seek to include material that others find offensive. For example, they seek to include sex education courses, literature with earthy language or conscious instruction in moral values, although some families may take a dim view of such choices.

Generally, as was the case where policymakers sought to eliminate something from the curriculum, if there are valid education reasons for including material, the decision is within the discretionary authority of public school officials. However, if the material is of a religious origin, or discusses religion, questions will obviously arise under the religion clause of the first amendment.

Material Without Religious Significance

A decision to include material in the curriculum based exclusively on education need would be virtually invulnerable to legal challenge. Such decisions are well within the discretion of school officials, and unless there is something to suggest improper motive, the courts undoubtedly would uphold the official action despite a constitutional challenge. State legislatures act well within constitutional boundaries when they decide to require subjects they believe will benefit students. This is true even for such sensitive topics as Darwinian theory, sex education or moral instruction. If given legislative authority to set curriculum, other education officials are similarly acting within their discretion. This is true even where families object to material because of, in the words of one complaint filed against school officials, the presence of "matter offensive to Christian morals, matter which invades personal and familial morals, matter which defames the Nation and which attacks civic virtue, and matter which suggests and encourages the use of bad English."[104] (The court did not identify the material found so offensive.) In another case, the same reasoning was applied to uphold the decision of school officials to assign a book by Kurt Vonnegut *(Slaughterhouse Five)*, although some families objected on religious grounds to certain offensive material in the book. To expunge any idea or phrase because it offended somebody's religion would be, as

the court recognized, stifling to free expression.[105] The constitutional priority to free expression would itself protect material selected in an effort to present the secular value system of the community. As the Supreme Court has observed, "the state has no legitimate interest in protecting any or all religions from views distasteful to them . . . ."[106] It must be recognized, however, that excusal may be necessary to accommodate students who find the instruction objectionable on religious grounds. The rules for excusal will be discussed below.

Thus far, most challenges to decisions to include such sensitive subjects have focused on sex education. One such challenge to the programs of five school districts in California was quickly thwarted when the state appellate court dismissed the lawsuit because the plaintiffs failed to describe any constitutional wrong in their complaint. The court rejected the argument that the program represented an unconstitutional establishment of religion. The court found that the program was neutral with respect to religion, noting that teachers were instructed to advise pupils that a variety of beliefs on sexual morality existed and to suggest that they seek advice from religious counselors on such matters. Under such circumstances, the court felt the course was not hostile to religious beliefs.[107] The court found no interference with the free exercise of religion, reasoning that under the state education code, any child could be excused from any part of the objectionable course if it posed a conflict with the parents' or child's religious beliefs or sensibilities[108].

On very rare occasions, pupil participation or nonparticipation in a secular program may imply espousal of a particular point of view. To require students to acknowledge one opinion or another on a controversial matter would violate their right to free speech, which, as the Supreme Court observed in *Barnette,* includes the right to remain silent. This constitutional problem emerged following a decision by the New York School Board to hold a Vietnam "War Moratorium" in the schools. The board's resolution announcing the decision expressed the view that the Vietnam War should be ended, and that discussion should focus on how to achieve this goal. The policy provided for excusal of those students and teachers who could not participate as a matter of conscience, but teachers were required to take one of their allotted "personal business" days, and student absences were to be noted. (The evidence introduced in court did not indicate whether the record of the absence would be made available to, e.g., future employers.) The state court receiving the case felt that attending might imply support and staying away might imply opposition to the board's view. The court concluded that the entire program was invalid under *Barnette.*[109] Assuming that absence or

presence imputed a point of view to the student, the court's logic is impeccable. The court's language goes further, however, and suggests that school boards have no authority to include in the curriculum controversial political subjects. This goes too far, given the Supreme Court's view of schools as a "marketplace of ideas," and the holding in *Tinker* that upheld the right of students to express their views on the very same subject — the Vietnam War. The problem was not the controversial nature of the subject, but the way in which it was presented — without an opportunity to debate underlying assumptions and without an unqualified opportunity to decline from the debate for conscientious reasons.

Material With Religious Significance

A decision to include any kind of material in the curriculum because of the policymaker's religious preferences would be an unconstitutional establishment of religion. Such material could be included in the educational program for sectarian reasons, however. Indeed, a complete and conscientious presentation of certain subjects necessitates reference to religion or religious institutions. History is one such subject; the Court acknowledges this: "The history of man is inseparable from the history of religion."[110] Sex education is another.[111] Finally, a course in moral instruction could be awkward without reference to religiously significant concepts or materials.

The Court has recognized the secular use of religiously significant materials. For example, the "objective" study of the Bible has been approved in dicta. The Court on one occasion even seemed to suggest that it would be legitimate to use religious materials for the "promotion of moral values" as well as "the contradiction to the materialistic trends of the times . . . ."[112] If both secular and sectarian works were presented and treated similarly, the use of the sectarian material would seem to be for secular education purposes and permissible.

As discussed in Section I of this booklet, to determine whether the establishment clause has been violated, the Court will apply a strict test — requiring both neutral intent and impact, and freedom from even the appearance of support or hostility to views on religion (the entanglement standard). But, also as discussed in Section I, the effect of books and ideas on active minds is difficult to control. Further the entanglement standard is difficult to apply to curricular decisions, because it could result in exclusion of even secular material. Thus, purpose or motive becomes the part of the "test" likely to endure over time, at least as applied to decisions to include ideas, concepts or books in the public schools program. For this reason, the

following discussion will focus primarily on the intent standard in the Court's three-prong test.

When proving purpose in a lawsuit, context is extremely important. For example, it would seem odd for a library of any size to fail to stock those books considered holy by a variety of religions. Nor would examination of such books in a philosophy course seem unusual. However, presenting excerpts from the holy book of just one religion in a school assembly should raise serious questions about motive. Further, in a scholarly presentation, one expects a broad spectrum of views and objective discussion of each. Where religious materials are presented without such discussion, especially where the approach is ceremonious or devotional, establishment of religion is the most likely purpose behind the presentation. Some specific examples of the application of this discussion are presented below.

Prayer

Prayer is a prime example of a religious or devotional practice. In *Engel v. Vitale,* the Supreme Court examined the daily reading of a prayer composed and promulgated by the New York Board of Regents, and ruled that such a practice was "wholly inconsistent with the Establishment Clause."[113] The prayer was a simple one, consisting of 23 words acknowledging dependence upon God and asking for "Thy blessings upon us, our parents, our teachers and our Country."[114] The Court acknowledged that the prayer was brief and general, but found it nonetheless a religious exercise and in violation of the establishment clause. One year later in *School District of Abington Township v. Schempp,* the Court extended this ruling to a state law requiring the public schools to begin each day with a Bible reading.[115] Since 1963, lower courts have struck down any form of state mandated school prayer,[116] including voluntary prayer (although there is one lower federal court decision upholding a Louisiana voluntary prayer law),[117] but excluding a moment of silence in which a student can turn to secular thoughts or utter a silent voluntary prayer.[118]

Thus, it appears that school officials would be acting on a relatively sound legal ground to require a moment of silence or an inspirational word — an original thought, a poem or even a passage from a book holy to some religion (selected by the student without encouragement or discouragement from teachers) — on the opening of a school day. A Massachusetts court has upheld a requirement of "meditation," as opposed to prayer or devotional exercises, reasoning that meditation can be secular in nature.[119] Such a practice could provide a transition from playground activities to serious learning, foster tolerance and harmony among students, or it could

simply be designed to help students become more serious and to contemplate higher values at any time. In the words of Mr. Justice Brennan, "[t]o the extent that such benefits result not from the content of the readings and recitation, but simply from the holding of such a solemn exercise at the opening . . . of the day, it would seem that less sensitive materials might equally well serve the same purpose."[120] (He suggested having a moment of silence, speeches of great Americans, or excerpts from national documents.) Once again, an analysis of overall circumstances will help to establish motive.

All the members of the fifth circuit, sitting together, recently held unconstitutional a Florida state law and a school board resolution (pursuant to the law) to require daily Bible reading and five to seven minutes each day of meditation in school, including an opportunity for individual prayer, Bible readings, devotions or meditation presented by groups, organizations or individuals, and patriotic exercises.[121] Also relevant was the fact that the resolution called for inculcation of "Christian virtues." An earlier decision by a three-judge panel had voided the state law inasmuch as it mandated a particular religious purpose, and further stipulated that "Christian" virtues be pursued.[122] (The court also indicated that a law requiring the teaching of "virtues" would probably be sufficiently secular.) The court observed that the rewording of the district's policy to require "inspirational" rather than "devotional" exercises would not save the policy, so long as the *practice* remained the same.[123]

Supreme Court Advice

Although the Supreme Court in *Abington School District v. Schempp* left room for "objective" examination of religious materials such as the Bible, it did not elaborate on what is "objective," other than to approve the study of the Bible for its "literary and historic qualities."[124] Some further guidance can be found in the discussion of the school aid cases. In determining whether a higher education aid program had a primarily secular or sectarian effect, the court has been swayed by (1) the fact that courses on religion were not limited to a single religion, (2) the absence of efforts to proselytize students, (3) the varied religious background of teachers and (4) the presence of "principles of academic freedom."[125] In a case dealing with public school curricula, this suggests that objective study of religious subjects would include at the very least, examination of many sources and teachers selected on some basis other than their religious affiliations or beliefs. Conversely, the uncritical presentation of ideas or materials from just one religion would be convincing evidence of an unconstitutional intent to establish religion. Such a presentation would amount to the official endorsement of the tenets

of the religious body or church originating the material, even more than barring evolutionary theory constituted such an endorsement in *Epperson*.

The Ten Commandments

The issue has arisen recently in several contexts. For example, a few states require that the Ten Commandments be posted in the public schools; some jurisdictions are plagued with demands that creationist views be included if Darwinian theory is taught; and Bible studies continue to appear as an issue in litigated cases. If approached in a neutral manner, and with a primary secular purpose, the appearance of such religious materials is acceptable under the establishment clause, while to exclude them may violate the free exercise clause.

However, presentation of material from religious sources has not been objective in most of the situations currently under litigation. For example, the North Dakota law requiring the posting of the Ten Commandments specified that it be "of the Christian Religion."[126] A federal district court in *Ring v. Grand Forks Public School District No. 1* had little problem finding this law invalid, noting the specific reference in the law to a particular religion as well as the sectarian nature of the last three commandments.

A slightly more difficult case arose out of Kentucky, for there the law made no reference to any particular religion. In *Stone v. Graham*, a tied vote of the state supreme court left intact a lower state court decision that found the posting valid.[127] One justice, who favored affirming, argued that the underlying law indicated a secular intent by describing the Ten Commandments as an expression of "the basic tenets of a particular scheme of western philosophical thought."[128] Another, also for affirming, felt that there was no establishment problem because private sources paid for the posters. Arguing in favor of overturning the law, half the court emphasized the religious nature of the material[129] and the necessity of choosing one version as the "official" version, thereby favoring the particular creed endorsing that version.[130]

None of these opinions accurately reflect Supreme Court mandates in the area. The subject matter of the material — whether expressing secular or sectarian views — is not the critical element, although it may be evidence of an intent to establish religion. The source of funds is also not relevant if public officials are endorsing a particular religious view through acceptance of the funds. In a *per curiam* opinion, the Supreme Court reversed, finding "no secular legislative purpose" in the posting.[131] The brief opinion made it

clear that unconstitutional purpose was the sole basis for the decision, and the fact that the material was religious in nature was significant only insofar as it cast light on purpose:

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments is undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. . . .
>
> This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. . . . . Posting of religious texts on the wall serves no such educational function.[132]

The High Court's decision in *Stone*, although by no means an attempt to explain in detail the underlying principles, helps to emphasize a number of points. First, although the Court recited the three-prong test for establishment cases (neutral purpose, primary secular effect and no entanglement), it decided the case on the basis of purpose alone. It explicitly avoided the effect and the entanglement standards. Evidence of unconstitutional motive was found in the approach of school authorities. The posting was done without inquiry and no attention was given to aesthetic, cultural or historical values. No similar material was presented from other secular or sectarian sources. In fact, there was no commentary on the material in any form, other than a fine print notice, in the words of the state law, that the material reflected "basic tenets of . . . western political thought," a comment that neither party seemed to see as "commentary."

The silent posting, the defendants argued, was objective precisely because of lack of comment, but such an argument reflects a serious misunderstanding as to how objectivity is achieved. Display of a symbol or symbols of just one religion without comment is normally not objective; it is an expression of religious preference.

Plaintiffs in *Stone* also argued that the posting ran afoul of the entanglement standard, citing at least nine versions of the Commandments and a need to select just one, giving preference to those sects advocating that version. A somewhat similar argument was forwarded by half of the reviewing justices of the state supreme court. Such arguments would rule out any study of any religious material and should be rejected. Material can be selected for secular reasons — cheaper books, size of print, use of vernacular, etc. If the entanglement standard were used to eliminate the Ten Commandments, it could be used to eliminate the objective study of the Bible and other religious books, and possibly evolutionary theory as well.

That is, there are many secular decisions that may affront particular religious sects, but that is no reason to avoid making the decision.

The High Court's brief opinion is based on a total lack of educational purpose in the posting of religious material. However, given the proper context, educational purposes alone could underlie a posting. For example, a library that displays excerpts of works attributed to Moses, along side other historic lawgivers, such as Hammurabi, Solon, Justinian, Coke, Jefferson and Justice Burger, would be providing a fascinating and informative overview of the origins of law in western philosophy. The Court would undoubtedly recognize this as an objective presentation. Finally, inspirational symbols or observances, even those with a religious origin, may have a secular purpose and school officials may be able to adduce evidence to this effect. The display of the Golden Rule should be permissible, despite the use of the particular version appearing in the New Testament. Material whose religious origin is more readily recognized would fare differently, of course, and the purpose behind a display should then be examined. Even here, one court has upheld the display in classrooms of the national motto, "In God We Trust," without giving any particular reason other than the fact that this is the national motto and it appears on public buildings.[133] Another has upheld the use of the phrase "under God" in the pledge of allegiance,[134] and yet another court has held that the religious references in the national anthem are "incidental" and constitutionally permissible as part of school ceremonies.[135] Of course, it would be unconstitutional under *Barnette* to punish any student who omitted the reference to the deity or who refused to participate in these national observances, and an excusal policy would be mandated by the courts if the school did not have one.[136]

Christmas Carols

The Christmas season presents another occasion where school officials are tempted to promote or permit the display of material of a religious origin. A constitutionally valid way of handling religious material during holiday seasons, short of eliminating the material altogether, has been worked out by the Sioux Falls (South Dakota) School District.[137] After a federal district court found one Christmas celebration unconstitutional,[138] a citizen's committee examined the court's order and developed a set of rules that were subsequently adopted by the school board as official policy. The plaintiffs went back to the same judge asking that the new policy also be invalidated. The district court refused, although there had been evidence that under the new policy Christmas songs with religious content (e.g., "Silent Night") had been sung in a school assembly. The dis-

trict court observed that the songs had been "assimilated" by the secular culture.[139] This part of the court's opinion seems faulty, given the testimony of clerics that the songs were religious. On appeal, the U.S. Court of Appeals for the Eighth Circuit (with jurisdiction in Arkansas, Iowa, Minnesota, Missouri, Nebraska and North and South Dakota) recognized the religious content of the songs, and upheld the policy and its application for other reasons. The circuit court took pains to point out its holding was primarily based on a review of the policy itself, insofar as the only evidence regarding implementation was the one Christmas assembly and the singing of songs such as "Silent Night."

The policy which thus came under judicial scrutiny stipulated that "no religious belief or non-belief should be promoted," and called for observance in schools only of those holidays with both religious and secular elements. The policy permitted music, art, literature and drama having a religious theme or basis if "presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday." Religious symbols were permitted if used as an aid or resource in the secular discussion of the holiday.[140] The circuit court held that the policy had a secular purpose. The language of the policy statement seemed to offer the primary evidence. Evidence of purpose also included the history of the development of the policy, which included a proposal to limit any observance of holidays to the secular aspects only; this proposal was defeated by school board vote. The court agreed with the board majority that the Constitution permitted religious material in the holiday observance, so long as it was presented objectively. The court also applied the other two parts of the Supreme Court's three-prong test for establishment cases, and found a primary secular effect and no entanglement between church and state, although the opinion on these points did not provide great detail,[141] reflecting perhaps the awkwardness of applying these tests to material to be presented in an education context (as discussed in this booklet under the section on *Legal Framework*). Excusal was permitted for objecting students — an important element designed to avoid placing a burden on the free exercise of religion by children who found the holiday presentations to conflict with their religious beliefs.[142]

The decision was a close one, as evidenced by the 2:1 division on the circuit court panel. The presence of additional elements could have altered the result. For example, failure to include the religious holiday songs of others in the student body at the assembly or other timely assemblies would be evidence of a preference for the Christian religion. Only one assembly yearly devoted to the songs of only one religion is also highly suspect. In such circumstances, it is more difficult to forward the secular purposes of fostering critical inquiry or enhancing the knowledge of students of a wide variety of views or styles in depicting religious views.

Bible Study

How to handle the study of religious books also remains a problem. As already noted, religious works could appropriately be assigned in certain courses, such as philosophy, world history or world literature. Such courses in elementary and secondary schools are rare, however, and a Bible study course for very young children should immediately raise questions as to the purpose of the course. In contrast, at the college level the Bible would normally be one of many books studied in appropriate courses.

Several years ago, some school districts attempted to avoid the problem of establishment of religion by inviting nonschool persons to provide in-school instruction. The Supreme Court declared this unconstitutional in *McCollom v. Board of Education.*[143] It was significant in *McCollum* that the school system permitted persons selected by private religious groups to teach the classes in the public school during regular school hours. It did not matter that pupils attended these classes on a voluntary basis. The Court voided the practice, holding that the Constitution forbids "use of tax-supported property for religious instruction and the close cooperation between school authorities and the religious council in promoting education. . . ."[144] Under such circumstances, the Court found that [t]his is beyond all question a utilization of the tax-established and tax supported public school system to aid religious groups to spread the faith."[145] The Court was concerned that school officials were not only providing a building but also an "invaluable aid in that it helps to provide pupils . . . through use of the State's compulsory public school machinery."[146]

That the use of the public school building was a critical element became more evident four years later, when the Court decided *Zorach v. Clauson.*[147] In *Zorach* the court approved a "released time" program whereby children were excused from the public schools and allowed to attend a parochial school for part of the school day. The captive audience and the close cooperation (the religious organizations reported attendance to school officials) were still present, but the instruction was removed to a private site. As will be discussed below, the use of the building by a religious group after school hours may also be permissible.[148]

Study of the Bible in public schools continues to provoke litigation to the present day. Some school districts have blatantly defied the Court's ruling in *McCollum.* Fifteen years after *McCollum* an identical fact situation arose in Tennessee. Two counties offered such a Bible study course. In addition to the unusual aspect of a course devoted to one religious book, the counties allowed a private reli-

gious organization to select the teachers for the course — just as Champaign County, Illinois did in *McCollum*. The court did not find anything wrong *per se* with the study of the Bible, but held that under the circumstances, the school intended to encourage religion. Interestingly, the court did not enjoin the course, but required the school system to develop its own criteria for the selection and employment of the teachers of the course, specifying that the board could not employ a religious test or any requirement for religious affirmation or profession of faith.[149] The court should perhaps have also specified that objective inquiry must be required, but it seemed to assume objective hiring of teachers would achieve this goal.

Transcendental Meditation

These principles apply equally to the study of nontraditional religions — the occult or the mystical. It may be difficult to identify some of these presentations as "religious" to those familiar with only more traditional religions. However, the same analysis will serve to determine whether the presentation violated the establishment clause. The teaching of a course offered by a New Jersey school system, titled "Science of Creative Intelligence" (a course in transcendental meditation) was enjoined by the third circuit in 1979.[150] Again, the teacher did not engage in critical inquiry, but rather conducted ceremonies and in general presented concepts to be taken and practiced on the basis of faith alone.[151]

Evolution and Scientific Creationism

Instruction in the origin of humans also remains a perennial problem that has not been fully resolved by *Epperson v. Arkansas*. Many school districts face a growing pressure to include a creationist view along with instruction in evolutionary theory. *Epperson* did not preclude creationism in the curriculum; it only addressed *exclusion* of Darwinian theory for religious reasons. But the converse of *Epperson* would be *inclusion* of a subject for religious reasons. Thus, the reasoning in *Epperson* would require voidance of attempts either to exclude or include topics *if done in order to promote religious views*, even if the topic is facially neutral. For example, in *Daniels v. Waters*, the fifth circuit reviewed an attempt only to *modify* the teaching of evolutionary theory rather than to ban it. The Tennessee law under challenge prohibited the use of those biology textbooks that presented theories about the evolution of man as scientific fact, and required texts treating the subject of evolution to give equal time to the Biblical view of creation, but not the converse. The law also required that textbooks containing material on evolutionary theory contain a disclaimer indicating that evolution is a "theory," but did not impose a similar disclaimer for creationist theory. The

court did not find the inclusion of the Biblical view to be invalid, but ruled only that the favoring of the Biblical view established religion. In short, state legislatures may require a diversity in points of view, presented objectively, wherever the subject of the origin of humankind is to be presented, but they are not constitutionally compelled to do so, and they must not favor any particular view for religious reasons.[152]

There may be difficulty in pursuing scientific and religious material in the same class, however, stemming from the difference in approach of various disciplines. For example, generally acceptable scientific methods require that theories be supported by observable data.[153] Thus, Darwinian theory stands or falls on the empirical evidence available to support it. In contrast to the scientific approach, some religious doctrines provide competing explanations of the origin of man, based not on observable data, but on faith.[154]

If, in fact, creationist theory is included in science classes for secular reasons,[155] then it too should be subjected to critical inquiry, following the rules of science. On such a basis, it would seem legitimate to include it, even in a science course. Those who seek to have creationist theory included for religious reasons would undoubtedly balk at having it subjected to critical inquiry. (Indeed, they would have a solid ground for obtaining excusal from this course of study.) Those who seek to include it for secular education reasons should not be upset by critical inquiry. Indeed, the presence of critical inquiry would make an excellent test for the establishment clause when applied to concepts to be included in the curriculum.

Some attempts have, in fact, been made to include creationist theory in science classes. For example, the Indiana State Commission of Education attempted to add a text that included both general and creationist theories to its list of seven approved texts for biology courses. The state superior court voided the decision in *Hendren v. Campbell*, finding that the text was riddled with religious references.[156] The issue is likely to continue as a litigated issue, given the number of states and school districts that seek to require or encourage the teaching of both creationist and evolutionary theories in science classes.[157]

Teaching Tolerance

Promoting religious tolerance would clearly be a secular goal that could legitimately be pursued in the public schools. How education policymakers are to go about this task without promoting religion or nonreligion remains a tricky business. The best approach seems to be to encourage expression of diverse views among students,

parents and the community, without officially supporting one view over another. In this way the schools by example promote an attitude of acceptance and even appreciation of diversity.

The secular goal of promoting tolerance, as well as the secular goal of making schools a "marketplace of ideas" would be served by allowing students to explain their personal religious practices and beliefs to their classmates. The extent to which the school official should encourage such discussion is, of course, limited. Overly enthusiastic encouragement of the expression of religious views would make observers wonder whether there was some underlying evangelical purpose. However, balanced presentations would serve to broaden the perspective of individual students. This would require giving equal time to the students of varying religious backgrounds as well as presentations of religious and nonreligious views that may not be represented in the student body. A discussion of religious holidays of various faiths, and the teaching of songs, games and customs connected to a religious holiday would also be permissible on this basis. However, singing the same songs or observing the same practices as a religious exercise would not be permissible. Distinguishing between the two should depend on the circumstances. A classroom discussion that gave equal time to all the various religions of students in the classroom and selected other views (religious and nonreligious) would seem to be no more than providing access to a forum for various views — something schools are supposed to do.

Summary of Discussion on Inclusion of Material With Religious Significance

In conclusion, the study of religious materials could have a sound secular purpose and could therefore be included in the curriculum in appropriate contexts. Religious material might be found in courses on literature, art, music, culture, even social studies. Such materials are less likely to be found in science courses, although it is possible even here if the approach to the religious material is on the same basis as the approach to secular material, i.e., one of critical inquiry. Further, as the purpose behind the assignment of religious material must be secular, a variety of views should be presented. The objective study of a religious book such as the Bible would involve a variety of other related books or commentaries chosen for secular reasons, critical discussion and teachers chosen for their secular training. If a course is devoted to a study of the Bible alone, one would expect the teacher to include commentary on the Bible from a variety of sources, religious and nonreligious, rather than an interpretation acceptable only to a particular religion or group of religions. If, however, only one book or the holy books of only one

religion are assigned, or teachers are chosen for their religious affiliation, a court is likely to find an unconstitutional purpose of establishing religion.

IV. Accommodating Diversity

In a constitutional system that encourages diversity in views, expression and religion, it is to be expected that some parents and students will have strong objections to the choices made regarding public school curriculum. Accommodation of a variety of views and religious practices is not only permissible under the first amendment, but in some cases it may be required.

A number of ways of accommodating the dissenter are possible. The program could be altered to exclude the objectionable material, but this may raise issues relating to censorship. Another solution would be to balance the presentation by including the dissenter's point of view. If modification of the program is not educationally desirable or not constitutionally permissible, then the dissenter could be excused from participating in the objectionable part of the program. Finally, regardless of program design, teachers, students and others may inject individual views and possibly even individual religious practices into the school day. School officials must then make a decision as to the extent to which such views or practices are to be restricted or tolerated.

Exclusion of Material to Accommodate Dissenters

Normally education policymakers are free to include or exclude what they will in the public education program. However, the discussion in Sections I through III should make it clear that where educators censor materials for less than compelling purposes, it violates the free expression clause of the first amendment, and if they are motivated by religious purposes they violate the prohibition against establishing religion.

Courts generally believe that education officials have a responsibility to insure that the schools operate in a manner that is "consistent with the prevalent view of the community as to what are the basic values, concepts, and skills."[158] In fact, in a democratic process, one would expect education policymakers to make an effort to be responsive to citizen demand,[159] observing constitutional limits at the same time. And although the Supreme Court accepts compelling reasons as justification for restricting free speech, community demand does not seem to be sufficiently compelling to override a first amendment right. Indeed, the Bill of Rights is designed to protect

minority views from majority repression. Further, *Tinker* holds that the unpopularity of the views of the students wearing black armbands was not sufficient reason for banning them. Of course, curricular decisions are different than decisions affecting student-initiated expression, but the cases dealing with censorship of texts and library materials suggest that most courts will scrutinize curricula carefully. The language of the seventh circuit in *Zykan* also suggests that curricular decisions based on some "orthodoxy" is constitutionally suspect. It would seem a wise course to follow the rules outlined in Section II before excluding any material from the curriculum.

School officials may also seek to eliminate material that conflicts with the religious beliefs of dissenters. However, *Epperson* forbids elimination of material for such reasons. This would hold true even if there was considerable objection based on religious grounds to the material. In fact, the stronger the religious objections, the more clear it would be that the government was favoring a religious view by excluding the objectionable matter.

Inclusion of Opposing Views

Another possible way to accommodate those in disagreement with the curricular decisions of school authorities is to present a wider range of views, and thus to include the views of the dissenters along with the choices of education policymakers. Where the new material sought to be included on this basis is *secular* in nature, school officials wishing to be responsive to such community pressure would face no particular constitutional problem.[160] However, this solution is limited by the religion clause of the first amendment. Inclusion of material *because* of its religious value to a portion of the community is the converse of *Epperson*, and carries with it the same fatal religious purpose.

It should be recognized that education policymakers may have secular reasons for including the views of dissenters, even though the latter dissent for religious reasons. It is the purpose or motive of school officials that the court must examine, not that of the dissenter. However, the fact that there was considerable community pressure based on religious beliefs should be among the total circumstances that a court takes into account when assessing official intent. Specifically, the inclusion of creationist theory alongside evolutionary theory would clearly be secular if both were subject to critical discussion. If not, and especially if this approach followed requests from religious groups, the courts would be failing in their duty if they did not find an unconstitutional intent to establish a religious view.

Excusal

Excusal is a convenient way of accommodating those who object to portions of the curriculum and, further, the courts appear to regard this as a valid way of preserving the right to free exercise of religion.[161] It should be noted that excusal is not available as a cure to an establishment problem. Establishment is unconstitutional, and excusal in such a context is irrelevant.[162] Excusal is only available to accommodate those who dissent from the valid choices of school officials.

In rare cases, the Court has even *required* excusal of dissenters in order to protect their right to free expression or free exercise of religion. *Yoder* represents an extreme form of excusal — allowing exemption of the Amish from compulsory education laws altogether. One commentator recommends excusal from an entire course or block of courses if evolutionary theory is presented, and it poses conflicts with the free exercise of religion for individual students.[163] The excusal should extend as far as necessary to protect religious free exercise, and may therefore require absence from a portion of a course or the entire course.

In an Illinois case, students were excused from physical education by a federal court, despite a state law mandating the course and forbidding excusal for religious or any other reasons. The students were members of the United Pentecostal Church and forwarded religious objections to the typical attire of classmates, which was considered "immodest" for coeducational classes.[164] (Title IX bars segregated gym classes except where contact sports are played.) In contrast, a student seeking to be excused from physical education classes on nonreligious grounds based on modesty and dislike of competitive athletics was denied relief in Vermont.[165]

Excusal is not required if there are sufficiently strong education reasons for a requirement. In one case, parents sought to have their children excused from health and music classes because of religious objections to the use of audio-visual materials. A federal district court denied relief, ruling that a school board has a valid interest in requiring a uniform education program for all students and observing that accommodating various religious objections on all matters would be impossible. The court held that the students should be excused from activities where audio-visual equipment was used for entertainment purposes, but not where it was used for education purposes.[166] In most cases excusal is a matter of discretion. Excusal is probably not constitutionally required except in extreme cases. The

Court has required it only where dissenters are able to show that a requirement places a serious burden on their free expression or religious free exercise and that the excusal would not seriously thwart the secular purpose of the law from which an individual seeks exemption.[167]

Tolerating Nonofficial Views and Practices

Much that is said in the public schools is unplanned and beyond the control of school authorities. That is, regardless of program planning, schools that fulfill their highest purpose of encouraging free inquiry into and free expression of ideas by students and teachers will become public forums for those who participate. Some of these unexpected or unplanned views that will inevitably emerge may have a moral, immoral, religious or irreligious message. As already observed, censorship by school officials is justifiable only by compelling circumstances. This would extend to the views of students in school, as is made clear in *Tinker*. Where the public schools serve as a marketplace for ideas, it is difficult to justify excluding any idea — if appropriately presented in the right time, place and manner.

As part of its interpretation of the free speech clause, the court has held that once a governmental body opens a forum to any particular point of view, it may not then close it to contrasting viewpoints.[168] This applies to both "good" and "bad" ideas. There may be some modification of this general rule where the forum involves a captive audience consisting of young and impressionable children,[169] but the general rule is a good guide. For example, where a child uses vulgar terms *to express an idea* or *expresses a view* that is distasteful, the constitutional concern would discourage the teacher from censoring ideas. The education and moral concerns may constitutionally be handled by having the teacher explain why the *form* of expression chosen is considered distasteful or vulgar by educators or others.

This principle of equal access applies in particular to student use of school facilities after school hours. In the context of secular goals at a university, the Court has required a public official to accord equal access to campus facilities to members of varying political organizations, regardless of their views in *Healy v. James.*[170] The university feared the implications of granting such access to a local chapter of Students for a Democratic Society (SDS), but the Court found the reasons inadequate to justify exclusion, specifying a procedure and a basis for excluding organizations that was founded on actual disruption or refusal to abide by university rules.[171] Access to university facilities, including campus mail, has also been required to accommodate labor organizations.[172] From this one might conclude that if

high school students are allowed access to the facilities for organizational purposes, the use may not be denied because of a disagreement with the *views or ideology* of those students.

The Supreme Court has not yet reviewed a case dealing with equal access to the schools for the purposes of airing *religious views*, but schools are unquestionably a public forum and the general rule of equal access to this forum should apply. In a case decided on a *free speech doctrine* (one not discussed in this booklet, relating to prior restraints on speech), the Supreme Court has held that a particular religious sect could not be barred from giving "Bible talks" in a public park, where the park was generally accessible to community organizations.[173] The religion clause provides additional support for this view, insofar as it requires neutrality of public officials.[174] Thus, in public school discussions of moral issues, the religiously-based views of a student could not constitutionally be excluded. (See the concluding remarks in this section for a recommendation as how to handle this.)

This Supreme Court case would also suggest that where access to facilities is generally granted to organizations it could not be denied to some because of a religious affiliation, or because they seek to use the facility for *discussion* that may include religious matters (as opposed to the practice of religion). Lower court holdings on this issue have been mixed,[175] however, but the principles of neutrality would be better served by not examining the *views* to be presented, when granting access to the facilities; that is, providing access to students or the community for the purposes of expressing views on either secular or religious topics should be even-handed. On the other hand, school officials who admit a religious group on an *ad hoc* basis without first formulating a neutral policy regarding admission to the building are probably favoring that religious group.[176] Conversely, allowing community groups generally to use the building for discussion, meetings or social purposes and disallowing religiously-affiliated groups seeking to use it for the same secular purpose would be hostile to religion.

Access to the building for religious *practice* is a yet more difficult case. Clearly, religious practice as part of the school program is an unconstitutional establishment of religion. But, the nondisruptive practices of students (such as quietly saying a grace before lunch) should be protected as free exercise of religion. That is, such unobtrusive religious practices by students in school do not disrupt the school program, and inasmuch as the child must spend considerable time in school, it would restrict the free exercise of religion to forbid it. Further, if the Supreme Court's handling of religious practice in public parks can be transferred to school facilities during periods

when school is not in session, religious practices should be allowed at these times,[177] so long as public officials do not approve or disapprove the religious practice itself, but limit their role to making a facility available on an impartial basis to community organizations. If in fact the school building is generally available to community groups after hours, then it does become a facility much like a park, and access should be granted to any and all on an impartial basis. (Once again, the reader is reminded that the Supreme Court has not dealt with this issue and that lower courts are divided.[178] Further court testing seems inevitable and education policymakers seeking to implement this kind of open policy should be prepared for a law suit.)

Perhaps the most frequent application of these principles occurs where a teacher presents a secular subject and a student responds with a personal religious view relevant to the subject. At this point the teacher has the most delicate task, and must appear neither to favor nor to disfavor the views of the student. To abruptly end the discussion would appear hostile. To attempt to continue it too long may appear overly supportive. Yet, it would seem appropriate for the teacher to solicit the views of other students and to summarize the discussion. It would be highly desirable from both an educational and legal point of view for the teacher to tell the students that in this country the first amendment requires him or her, as a representative of the government, to neither favor nor repress religious views, and to provide a brief history behind the religion clause and its importance to a democracy. The teacher would be expressing the constitutional goal of religious tolerance and imparting important knowledge about the value system in this country, as expressed in its Constitution; at the same time the teacher would be providing a clear explanation to students on why s/he was remaining neutral in the discussion.[179] In this way, the best of both secular and sectarian worlds would be retained.

Footnotes

[1] Both the 1975 and 1980 Gallup surveys on attitudes toward public education included a question on moral instruction: "Would you favor or oppose instruction in the schools that would deal with morals and moral behavior?" In both years, 79 percent of the respondents favored the idea. Among school parents, 84 percent were in favor as opposed to 12 percent in opposition, and among parochial school parents 83 percent were in favor as opposed to 12 percent in opposition. Seventy-eight percent of persons with no children in school favored the idea. George H. Gallup, *The 12th Annual Gallup Poll of the Public's Attitudes Toward The Public Schools.* Phi Delta Kappan, Sept., 1980, 33, at 39.

[2] Schenck v. United States, 249 U.S. 47, 52 (1919) (Mr. Justice Holmes, speaking for the Court).

[3] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (removing that which is "threatening, profane or obscene" from constitutional protection).

[4] Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

[5] Other categories of unprotected speech include the "threatening" or "profane." See note 3 *supra.* The Court has not, however, taken an opportunity to scrutinize these categories and to give guidance on how to narrowly define them. It should be noted that the Court has recently re-evaluated one type of speech — commercial literature — once considered unprotected, and now classifies it as protected. *See, e.g.,* Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[6] Tinker v. Des Moines School Dist., 393 U.S. 503, 508 (1969).

[7] See Lathrop v. Donohue, 367 U.S. 820, 873 (1961) (dissenting opinion); Scales v. United States, 367 U.S. 203, 261 (1961) (same); Communist Party v. Subversive Control Bd., 367 U.S. 1, 164 (1961) (same); Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (same); Barenblatt v. United States, 360 U.S. 109, 141 (1959) (same). See also Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview,* 37 N.Y.U.L. Rev. 549 (1962).

[8] When the Court first addressed this issue, it formulated a test that would require the prohibited words or actions to be "of such a nature as to create a clear and present danger that they will bring about the substantive evils" that the government has a "right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940). This test prevailed for over three decades, but it drew much criticism for its lack of flexibility to fit varying situations and finally was repudiated. Dennis v. United States, 341 U.S. 494 (1951). The court made it clear that the state die not have to wait "until the putsch is about to be executed. . . ," and it rejected "the contention that success or probability of success is the criterion." *Id.* at 509, 510.

[9] The Court used a balancing test in Schneider v. State, 308 U.S. 147, 162 (1939), but it has also indicated problems with the idea of a balancing test and will pass judgment on another basis if it is available. *See* United States v. Robel, 389 U.S. 258, 268 n.20 (1967).

[10] *Sherbert v. Verner* 374 U.S. 398, 403 (1963), quoting NAACP v. Button,

371 U.S. 415, 438 (1963) (a free expression case): "any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power. . . .'" However the test is expressed, it is not enough that a policy be reasonably related to some justifiable end; a stronger justification is needed. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Sherbert v. Verner, 374 U.S. 398, 406 (1963); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943). *See also Comment, The Religious Rights of the Incarcerated,* 125 U. Pa. L. Rev. 812, 837 — 56 (1977) (arguing that at least seven distinct tests can be identified, but concluding that a compelling interest test seems to prevail in most free exercise cases); Duval, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication,* 41 Geo. Wash. L. Rev. 161, 164 — 86 (1972).

[11] 393 U.S. 573 (1969).

[12] *Id.* at 509.

[13] *Id. at 508.*

[14] *Id.* at 512—13.

[15] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[16] *Id.* at 632.

[17] *Id.* at 633.

[18] *Id.* at 634.

[19] *Id.*

[20] In Lipp v. Morris, 579 F.2d 834 (3rd Cir. 1978), the third circuit (Delaware, New Jersey, Pennsylvania, Virgin Islands) upheld the right of students to remain seated during a flag salute. No mention of religion appears in the opinion. The second circuit (Connecticut, New York, Vermont) is in accord. *See* Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973). The court struck down a school board regulation that reguired nonparticipants to leave the room. *Id.* at 638. Previously, the same court had upheld the right of a teacher to stand silently during the flag salute. Russo v. Central School Dist. No. 1, 469 F.2d 623 (2d Cir. 1972), *cert. denied,* 411 U.S. 932 (1973). Additional authority supporting the right to remain silent during the flag salute may be found in Hanover v. Northrup, 325 F. Supp. 170 (D. Conn. 1970) (upholding the right of a teacher to remain silent during the pledge of allegiance); Banks v. Board of Pub. Instruction of Dade County, 314 F.Supp. 285 (S.D. Fla. 1970) (three-judge court) (upholding right of Unitarian to sit silently during pledge, although specific reason for dissent was more political than religious), *aff'd per curiam,* 450 F.2d 1103 (5th Cir.) *vacated for procedural reasons,* 401 U.S. 988 (1971); Frain v. Baron, 307 F. Supp. 27 (E.D.N.Y. 1969); State v. Lundquist, 262 Md. 534, 278 A.2d 263 (Md. 1971). One court has held that public school students (Jehovah's Witnesses) have the right to remain seated during the playing of the national anthem. Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963). *But see* note 21, *infra.*

[21] Some courts *may* find greater justification for controlling teacher expression in specific situations, because of the role a teacher plays. For example, one court has held that a teacher cannot be excused from participation in patriotic exercises, even though she may have strong religious objections. The court was fully aware of the fact that the Supreme Court has held that students should be excused under similar circumstances. *Compare* Palmer v. Board of Educ., 603 F.2d 1271 (7th Cir. 1979) (upholding dismissal of teacher who refused to teach pledge of allegiance) *with* West Virginia State of Educ. v. Barnette, 319 U.S. 624 (1943) (rejecting punishment of students for same reason). *But see*

Opinions of the Justices, 363 N.E.2d 251 (Mass. 1971) (finding requirement of pledge from teachers to be probably unconstitutional).

[22] A comparison with the equal protection clause may be useful. The Court has held that an unlawful intent is an essential element in a violation of the clause, and a racially disproportionate result, standing alone, does not violate the constitution. *See* Washington v. Davis, 426 U.S. 229 (1976) (use of employment test upheld despite disproportionate exclusion of minorities); Village of Arlington Heights v. Metropolitan Housing Dev. Corp. (MHDC), 429 U.S. 252 (1977) (refusal to rezone upheld, despite disproportionate exclusion of lower income residents and minorities). Racial imbalance stemming directly from a school policy can be evidence of the required illegal intent, however. The Supreme Court explained this quite well in *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464—65 (1979):

> Actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. those cases *Washington v. Davis* and *Village of Arlington Heights v. MHDC)*, do not forbid "the forseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn.". . . Adherence to a particular policy or practice, "with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn." [quoting the district court opinion].

[23] *See* 393 U.S. 503, 510 (1968).

[24] 391 U.S. 368 (1968).

[25] *Id.* at 377 (footnotes omitted).

[26] In the tenth circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming) a short hair requirement was upheld, despite objections based on a right to free expression by Indian children. New Rider v. Board of Educ., 480 F.2d 693 (10th Cir.), *cert. denied* 414 U.S. 1097 (1973). the seventh circuit (Illinois, Indiana, Wisconsin), also applying *O'Brien*, has stuck down a similar grooming code on grounds that school officials failed to show a "substantial" government interest in the enforcement of the code. Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

[27] *See* cases cited notes 20—21 *supra*.

[28] "A law may be one 'respecting' the forbidden objective while falling short of its total realization." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). For convenience in this article, the term "establishment" will include anything tending towards establishment.

[29] *See* Walz v. Tax Comm'n, 397 U.S. 664, 672 (1970) (Burger, J., announcing the opinion of the Court).

[30] Sherbert v. Verner, 374 U.S. 398, 403 (1963). It should be noted that the Court said that such "incidental" restrictions "may" be justified by a "compelling" interest. The passage is quoted in note 10 *supra*. Note, however, that the Sherbert v. Verner formulation of the test does not preclude upholding incidental restrictions on first amendment rights under the *O'Brien* test.

[31] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); *In re* Jenison, 375 U.S. 14 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[32] *See, e.g.* Reynolds v. United States, 98 U.S. 145 (1878) for a case where excusal was not considered.

[33] *In re* Jenison, 375 U.S. 14 (1963). The Court vacated a conviction for contempt of court for refusing to serve on a jury because of religious

scruples.

[34] People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 67 (1964) (upholding use of peyote in religious ceremony).

[35] Sherbert v. Verner, 374 U.S. 398 (1963). The Court required South Carolina to pay unemployment benefits to claimants, although they had refused available work on grounds that it required them to violate the Sabbath.

[36] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[37] Reynolds v. United States, 98 U.S. 145 (1878) (upholding laws against polygamy despite interference with the free exercise of religion by Mormans). *Accord* Cleveland v. United States, 329 U.S. 14 (1946).

[38] Jacobson v. Massachusetts, 197 U.S. 11 (1905); Wright v. DeWitt School dist., 238 Ark. 906, 385 S.W.2d 644 (1965) (upholding vaccination requirements).

[39] Committee for Pub. Educ. and Religious Liberty v. Regan, 100 S. Ct. 840, 846 (1980). *See also* Roemer v. Board of Pub. Works, 426 U.S. 736, 748 (1976); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 772—73 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612—13 (1971).

[40] See cases cited note 39 *supra*. *Lemon v. Kurtzman*, for example, was decided on the basis of entanglement alone. The Court explicitly found no evidence of unconstitutional purpose in the programs of aid for private schools under review. *Id.* at 613. It did not decide the issue relating to effect. *Id.* at 613—14.

See also Stone v. Graham, 101 S.Ct. 192, 193 (1980), holding that "[i]f a statute violates *any* of these three principles, it must be struck down under the Establishment Clause." (Emphasis added.) In *Stone* a law was voided on the basis of purpose alone.

[41] *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976) (dicta):

> The Court has not been blind to the fact that in aiding a religious institutions to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.

[42] *See e.g.* Bradfield v. Roberts, 175 U.S. 291 (1899), cited with approval in Roemer v. Board of Pub. Works 426 U.S. 736, 426 (1976). In *Bradfield*, the Court upheld a public aid program to a charitable hospital run by nuns, acting under church auspices.

[43] Walz v. Tax Comm'n, 397 U.S. 674 (1970).

[44] Direct and unrestricted grants to private schools, including parochial school, have been uniformly struck down by the Court, *e.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973), but certain forms of financial assistance have been upheld, even though substantial, and therefore indirectly aiding the religious school in pursuing both its religious and secular goals. For example, the Court upheld Ohio's million dollar program providing direct aid to private schools to assist in the purchase of textbooks, instructional materials, equipment, the administration of standardized tests and scoring, diagnostic services and therapeutic services to children at a religiously neutral site. Wolman v. Walter, 433 U.S. 229 (1977). The Court struck down only aid for field trips and certain limited items of instructional materials (*e.g.*, tape recorders).

[45] Walz v. Tax Comm'n, 397 U.S. 674 (1970). *See also* Roemer v. Board of Pub. Works 426 U.S. 736, 748 n.15 (1976) (Blackmun, announcing deci-

sion of the court).

[46] Walz, 397 U.S. at 673, 674.

[47] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[48] It is possible material could be purged for the secular purpose of complying with the Constitution, under a misadvised interpretation of the constitution. In this case under an intent test alone, no establishment has taken place. In such cases, however, the courts should nonetheless correct the matter, acting as final arbitrators of legal interpretation. *See e.g.* the treatment by the court in Chess v. Widmar, No. 80-1048 (8th Cir., Aug. 4, 1980), discussed *infra* at note 175. The court reversed a university decision to exclude a religious group from campus, although university officials believed that they were following the requirements of the establishment clause. The deference to administrative decision applies only to nonjudicial type decisions. *See Note. Administrative Law – Scope of Review: Review Court May Not Examine Whether Fundamental Rights Have been Violated,* 47 Wash. L. Rev. 707, at 707 (1972).

[49] Zorach v. Clauson, 343 U.S. 306, 312—14 (1952) (Douglas J., delivering the opinion of the Court).

[50] 393 U.S. 97 (1968).

[51] *Id.* at 98—99.

[52] *242 Ark. 922, 416 S.W.2d 322 (1967).*

[53] *393 U.S. at 103.*

[54] *Id.* at 103—04. *See also* Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975) (holding unconstitutional Tennessee law requiring creationist view be presented with evolutionary view); Steele v. Waters, 527 S.W.2d 72 (Tenn. 1975) (same).

[55] *Compare* Perry v. Sindermann, 408 U.S. 593 (1979) *with* Board of Regents v. Roth, 408 U.S. 564 (1972). *See also* Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1306 (7th Cir. 1980):

> [C]omplaints filed by secondary school students to contest the educational decisions of local authorities are sometimes cognizable but generally must cross a relatively high threshold before entering upon the field of a constitutional claim suitable for federal court litigation. Such a balance of legal interests means that panels such as the Warsaw School Board will be permitted to make even ill advised and imprudent decisions without the risk of judicial interference. Nothing in these principles suggests that the courts should condone short-sighted board decision-making. But nothing in the Constitution permits the courts to interfere with local educational discretion until local authorities begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute.

The seventh circuit upheld among other things, a decision to cancel seven courses.

[56] 393 U.S. 97, 111 (1968) (Black, J., concurring).

[57] Emerson and Haber, *The Scopes Case in Modern Dress,* 27 U. Chi. L. Rev. 522, 524 (1960); *but see* Sharp, *Science, Religion and the Scopes Case,* 27 U. Chi. L. Rev. 529 (1960) (arguing that prohibiting the teaching of any significant subject is an abridgement of free speech). Kalven, *A Commemorative Case Note: Scopes v. State,* 27 U. Chi. L. Rev. 505, 517 (1960). Kalven suggests that the state have a valid secular basis for eliminating the study of evolution if it tended to destroy the religious beliefs of young children.

[58] *Id.* at 109.

[59] *Id.* 109—14.

[60] See Ogletree, The Status of State-Legislated Curricula in the U.S., Phi

Delta Kappan, Oct. 1979, 133—135. He reports that 40 percent of the states require subjects dealing with reading, 35 percent with writing; 24 percent, grammar; 30 percent, spelling; and 28 percent, mathematics. Typically, the state prescription is very general, as in Hawaii, where it is specified that at least 50 percent of the school day be devoted to oral expression, written composition and spelling.

[61] *See* Gallagher v. Crown Kosher Super Market, 366 U.S. 617, 627 (1961) (upholding Sunday closing laws despite argument based on establishment clause).

[62] 413 U.S. 15, 24 (1973).

[63] 410 U.S. 667 (1973).

[64] 464 F.2d 136, 145 (8th Cir. 1972).

[65] 410 U.S. at 670. *See also* Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973) (university cannot discipline students who published letter containing a "four-letter" vulgarity).

[66] Ginsberg v. New York, 390 U.S. 629, 636 (1968). *See also* Quarterman v. Byrd, 453 F.2d 54, 57—58 (4th Cir. 1971) (suggesting that college and high school students should be treated differently); Koppell v. Levine, 347 F. Supp. 456 (E.D.N.Y. 1972) (same). Note the Supreme Court has also recognized, in another context, that college students are less impressionable than elementary and secondary students. Roemer v. Board of Pub. works, 426 U.S. 736, 750 (1976) (upholding an aid program to private universities); Tilton v. Richardson, 403 U.S. 672, 685—86 (1971) (same).

[67] FCC v. Pacifica Foundation, 438 U.S. 726, 749—50 (1978).

[68] Pinkus v. United States, 436 U.S. 293 (1978). The trial court had instructed the jury to consider "the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children from all walks of life." *Id.* at 296.

[69] For cases where the courts have applied the technical definition of obscenity and have held that particular publications were not obscene, *see e.g.* Vail v. Board of Educ., 354 F. Supp. 592, 599 (D.N.H.), *remanded for fuller relief*, 502 F.2d 1159 (1st Cir. 1973); Jacobs v. Board of School Comm'rs, 349 F. Supp. 605, 610 (S.D. Ind. 1972), *aff'd*, 490 F.2d. 609—610 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975). *Cf.* Scoville v. Board of Educ., 425 F.2d 10, 14 (7th Cir. 1970), *cert. denied*, 400 U.S. 826 (sentence "oral sex may prevent tooth decay" not a basis for punishment, applying *Tinker* standard); Thomas v. Board of Educ., 607 F.2d 1043 (2d Cir. 1979) (holding off-campus distribution is beyond reach of school officials).

In cases upholding school officials' decision to restrain student-initiated publications, the courts have, *e.g.*, found substantial disruption under the *Tinker* standard, Thomas v. Board of Educ., 478 F. Fupp. 114, 122 (N.D.N.Y. 1978) (thus avoiding application of definition of obscenity).

There are some notable exceptions to this pattern, *e.g.* Baker v. Downey City Bd. of Ed., 307 F. Supp. 517 (C.D. Cal. 1969); Norton v. Discipline Comm. of East Tenn. State Univ., 419 F.2d 195 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970). These cases were relied on by the court of appeals in *Papish*. As noted, this decision was later reversed by the Supreme Court.

[70] Frasca v. Andrews, 463 F. Supp. 1043, 1050 (E.D.N.Y. 1979).

[71] Reineke v. Cobb County School Dist., 484 F. Supp 1252 (N.D. Ga. 1980); Koppell v. Levine, 347 F. Supp. 456, 458—59 (E.D.N.Y. 1972). In *Reineke* the issue of obscenity was not seriously raised, as school officials sought to bar words such as "damn" and views that might be considered anti-religious of defamatory. The paper in question was sup-

ported largely by sales of advertising space, with ony a small school subsidy. It was attached to a journalism class. The court enjoined further interference with student editorial decisions, referring briefly to the technical definition of defamation at one point. *Id.* at 1258. In *Koppell* the court applied the technical definition of obscenity to a school-sponsored magazine and found it not obscene. It then sought a compelling need for censorship (the magazine had been impounded) and found none, save possible reputational injury to the school. This was cured by allowing the school to stamp a disclaimer on the copies of the magazine. *Id.* at 460. In *Antonelli* the court struck down a requirement of faculty review of a college-sponsored publication; the review was for the purpose of screening out obscenity, but did not follow adequate procedural safeguards. *But See* Frasca v. Andrews, 463 F. Supp. 1043, 1051 (E.D.N.Y. 1979) (upholding confiscation of school paper applying a "rational basis" test). However, the court did consider the possibility of a potential libel in the offending publication, applied the technical definitions developed by the Supreme Court, and concluded that the possibility was real. *Id.* at 1052. Under such a rationale, the publication contained material that was not protected under the first amendment and so a compelling justification would not be necessary.

[73] 631 F.2d 1300 (7th Cir. 1980).

[73] 474 F. Supp. 297 (E.D.N.Y. 1979).

[74] — F.2d — (2d Cir. 1980).

[75] 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

[76] 475 F. Supp. 615 (D. Vt. 1979) (defendant's motion to dismiss, granted).

[77] *Zykan*, 631 F.2d 1300, 1308 (7th Cir. 1980).

[78] Tinker, 393 U.S. 503, 512 (1969), quoting Mr. Justice Brennan in Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

[79] 541 F.2d 577, 582 (6th Cir. 1976) *rev'g* 384 F. Supp. 698 (N.D. Ohio, 1974). Other theories were also forwarded, but they were not sufficient to overrule school board discretion. For example, the court rejected arguments based on the due process clause, finding the Board's selection of textbooks to be reasonable — not arbitrary or capricious. The board also found no unconstitutional delegation of the board's statutory responsibility under Ohio law, and discretion to select textbooks.

[80] 454 F. Supp. 703 (D. Mass. 1978).

[81] *Id.* at 712.

[82] *Id.* at 714.

[83] Salvail v. Nashua Board of Educ., 469 F. Supp. 1269, 1273, 1275 (D.N.H. 1979).

[84] Opinion of the Justices, 337 A.2d 777 (N.H. 1975).

[85] Grosser v. Wollett, 45 Ohio Misc. 15, 341 N.E.2d 356 (C.P. Cuyahoga County, 1974).

[86] *Id.* at 367.

[87] *Id.* at 364.

[88] *Id.* at 367.

[89] For example, the court in *Right to Read Committee of Chelsea* observed in dicta that the situation might be different had the school committee declined to buy the offensive book, rather than to pull it from the shelves. 454 F. Supp. 703, 711 (D. Mass. 1978).

[90] *See, e.g.*, Presidents Council v. Community School Board, 457 F.2d 289, 290, 292 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). The general approach has the approval of the Supreme Court, which upheld a state law restricting the sale of materials to children, although they were available to adults. As part of the basis for its decision, the Court observed that the law did not prevent access to the material through a parent. Ginsberg v. State of New York, 390 U.S. 629, 639 (1968).

[91] A biology teacher had challenged the decision but failed to obtain relief from the court. Mercer v. Michigan, 379 F. Supp. 580 (E.D. Mich. 1974).

[92] Zykan, 631 F.2d 1300, 1304—05 (7th Cir. 1980).

[93] 393 U.S. 97, 104 (1968).

[94] Zykan, 631 F.2d 1300, 1305 (7th Cir. 1980) (citing Cary v. Board of Educ., 598 F.2d 535, 544 (10th Circ. 1979), discussed at note 158, *infra*).

[95] *See* Arons, *Bookburning in the Heartland,* Saturday Review, July 21, 1979, at 11.

[96] Zykan, 631 F.2d 1300, 1306 (7th Cir. 1980).

[97] *Id.* at 1308.

[98] 488 F.Supp. 1138 (N.D. Miss. 1980).

[99] *Id.* at 1149.

[100] *Id.* at 1154.

[101] *Id.*

[102] *Id.* at 1148.

[103] *Id.* at 1148, 1147, 1154.

[104] Williams v. Board of Educ., 388 F. Supp. 93, 95 (D.W. Va. 1975). Plaintiffs also alleged that the text promoted a disbelief in God and disregard for the Ten Commandments. There is no indication in the reported opinion what the subject matter of the course was, nor is there an identification of the texts selected. In any case, the court dismissed the complaint, finding no establishment of religion, and observing that religiously neutral decisions are the domain of state and local school authorities, not the courts. *Id.* at 96.

[105] Todd v. Rochester Community Schools, 41 Mich. App. 310, 329, 200 N.W. 2d 90, 93 (1972). It is interesting to note that the court applied the technical definition to obscenity to analyze objections based on this ground. *Id.* at 334, 200 N.W.2d at 96.

[106] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952).

[107] Citizens for Parental Rights v. San Mateo County Bd. of Educ., 124 Cal. Rep. 68, 51 Cal. App. 3rd 1 (Ct. App. 1975).

[108] *Id* at 84—86. The parents' organization filing suit also alleged violations of privacy, due process and equal protection under the ninth, tenth and fourteenth amendments, and corresponding provisions in the state constitution. The court found no denial of equal protection as the program was taught to all students without distinction as to their religious beliefs. The court rejected the due process arguments, finding the program neither unreasonable nor arbitrary.

The court did not discuss whether the policy would be upheld in the absence of an excusal provision. However, as will be discussed below, the Constitution does require excusal under certain circumstances.

A similar case has been filed in Alaska, based in part on state statutory requirements that parents be allowed to inspect course materials and to have their children excused from the class. Danner v. North Slope Borough School District, No. 77-28 (Alaska Sup. Ct., Barrow, filed Aug. 30, 1977).

[109] Nistad v. Board of Educ., 61 Misc. 2d 60, 304 N.Y.S.2d 971 (Sup. Ct. 1969). The court's opinion is confusing at some points. For example, the court seems to assume that absence from the moratorium implied dissent from the federal government's policy towards the war, 304 N.Y.S.2d at 975, but the particular point of view imputed to the absentee is not critical to the court's analysis.

[110] 370 U.S. 421, 434 (1962) (Black, J., speaking for the Court).

[111] Vitz, *Symposium on Sex and Children and Adolescents,* Character, Sept., 1980, at 5; Oldenquist, *Id.* at 3; Oldenquist, *Moral Instruction Without Moral Education,* Harv. Ed. Rev., May, 1979.

[112] Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963).

[113] 370 U.S. 421, 425 (1962).

[114] *Id.* at 422.

[115] 374 U.S. 203 (1963).

[116] *E.g.*, Alabama Civil Liberties Union v. Wallace, 331 F. Supp. 966 (D. Ala. 1971), *aff'd*, 456 F.2d 1069 (5th Cir. 1972) (daily Bible readings); Adams v. Engelking, 232 F. Supp. 666 (D. Idaho 1964) (same).

[117] *E.g.*, Kent v. Commissioner of Education, 402 N.E.2d 1340 (Mass. 1980). *But see* Karen B. v. Treen,—F. Supp.—(D. La. 1980) (appeal pending).

[118] Since 1966 Massachusetts has required teachers to "announce that a period of silence not to exceed one minute . . . shall be observed for meditation. . . ." A federal district court ruled that the absence of coercion and the opportunity for the student to "turn his mind silently toward a secular topic" saved the law from challenge based on the free exercise clause. Gaines v. Anderson, 421 F. Supp. 337, 342 (D. Mass. 1976).

In evaluating the potential conflict with the establishment clause, the court applied the three-part test announced in *Nyquist* and found it valid. The law, the court ruled, had a clearly secular purpose, a primary effect that neither advanced nor inhibited religion, and presented no problem of excessive entanglement between church and state. The court noted that "meditation" connoted serious reflection or contemplation on any subject, secular or sectarian, and that a moment of silence furthered the purely secular purpose of providing a transition between the tumult attendant upon opening of the school day and the beginning of classes. *Id.* at 342.

[119] *Id.*

[120] Abington School Dist. v. Schempp, 374 U.S. 203, 280 (1963). See also Gaines v. Anderson, *supra* note 118, at 342.

[121] Meltzer v. Board of Public Instruction, 577 F.2d 311 (5th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979).

[122] 548 F.2d 559, 578 (5th Cir. 1977), *this point affirmed by an equally divided court, en banc*, 577 F.2d 311.

[123] *Id.* at 574, *this point adopted by the entire court en banc*, 577 F.2d 311.

[124] 374 U.S. 203, 225 (1963).

[125] Tilton v. Richardson, 403 U.S. 672, 687 (1971) (plurality opinion).

[126] Ring v. Grand Forks Pub. School Dist. No. 1, 483 F. Supp. 272 (D.N.D. 1980). The state solicitor has indicated that there will be no appeal. School Law News, Mar. 14, 1980, at 4.

[127] Stone v. Graham, 599 S.W.2d 157, *reversed*, 101 S.Ct. 192 (1980). The issue has appeared before the Court, in Doremus v. Board of Education, 5 N.J. 435, 75 A.2d 880 (1950) (upholding a requirement that the Mosaic Ten Commandments be included in a course in morality and good manners). The case was dismissed as moot on appeal to the Supreme Court. 342 U.S. 429 (1952).

[128] *Id.* at 158.

[129] *Id.* at 161.

[130] *Id.* at 160.

[131] 101 S.Ct. 192 (1980).

[132] *Id.*

[133] Opinion of the Justices, 108 N.H. 97, 228 A.2d 161 (1967).

[134] Lewis v. Allen, 14 N.Y.2d 867, 252 N.Y.S.2d 80 (1964), *cert. denied*, 379 U.S. 923 (1964).

[135] Sheldon v. Fannin, 221 F. Supp. 766, 774 (D. Ariz. 1963).

[136] Lewis v. Allen, 14 N.Y. 2d 867, 252 N.Y.S. 2d 80 (1964), *cert. denied*, 379 U.S. 923 (1964).

[137] Florey v. Sioux Falls School Dist. 49-5, 464 F. Supp. 911, 912 (D.S.D. 1979), *aff'd*, 619 F.2d 1311 (8th Cir.) *cert. denied*, 101 S. Ct. 409 (1980).

[138] Kindergarten children engaged in a rhymed exchange, beginning with the teacher chanting "Of whom did the heav'nly angels sing, And news of his birthday bring?" The class answered "Jesus;" the remainder of the exercise was similarly faithful to gospel accounts of the first Christmas.

[139] *Id.* at 916.

[140] *Id., aff'd,* 619 F.2d at 1314.

[141] *See id.* at 1317—1318.

[142] *Id.* at 1318—19.

[143] 333 U.S. 203 (1948).

[144] at 209—10.

[145] *Id.* at 210.

[146] *Id.* at 212.

[147] 343 U.S. 306 (1952).

[148] *See* notes 173—178, *infra,* and accompanying text.

[149] Wiley v. Franklin, 468 F. Supp. 133 (E.D. Tenn. 1979).

[150] Malnak v. Yogi, 592 F. 2d 197 (3rd Cir. 1979).

[151] *Id.* at 198.

[152] Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975). Steele v. Waters, 527 S.W.2d 72 (Sup. Ct., Tenn. 1975). See also Ore. Attorney Gen. Op., Mem. No. 32 1980-81, Dec. 17, 1980; 58 Calif. Attorney Gen. Op. 263 (1975). Both Attorney General opinions also make it clear that a secular version of creationism is *not* constitutionally required.

[153] For example, The National Academy of Sciences has enacted a resolution declaring that basic precepts of science preclude reliance on supernatural causes, as there are no objective data by which to validate them. Resolution, National Academy of Sciences, Oct. 17, 1972. The resolution was directed explicitly to an effort by California in the early seventies to attempt the parallel teaching of evolution and creation. The Academy recommended against this approach on grounds that science and religion are "mutually exclusive realms of human thought." *See also* Le Clercq, *The Monkey Laws and the Public Schools: A Second Consumption?* 27 Vand. L. Rev. 209 (1974); J.A. Moore, *Creationism in California,* Daedalus, Summer 1974, at 173.

California has since modified its position on the matter, and has undergone suit by plaintiffs adhering to a creationist view. The judge ordered a settlement conference where it was agreed that the Board's publication would contain an addendum which explicitly indicated that it utilized an evolutionary point of view, that the theory of evolution was a theory, and other explanations or models "which could be supported by scientific data" may also be taught. Segraves v. State, No. 278978 (Cal. Super. Ct. Aug. 8, 1979).

[154] This conflict has been discussed at length by J. Charles Park:

> Of particular concern to educators is the New Right's perception of humanism and atheism in public education. The argument is advanced that when education is presented without reference to the truth as given by God, the schools in effect teach students to become atheists. Such concerns form the ground for much of the controversy that looms over public education. The themes illustrate a values conflict in which the New Right asserts that truth is revealed and that education must not be a vehicle for allowing an individual to explore ideas independently, but rather to accept without question established truths stated by selected authorities. The dimensions of this conflict suggest the need for renewed educational concern about academic freedom and the protection of diversity in a pluralistic democratic society during times of stress and change.

Preachers, Politics and Public Education: A Review of Right-Wing Pressures Against Public Schooling in America, 1980 Phi Delta Kappan 608.

[155] One author argues that creationism is based on fact. *See* Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 Yale L. J. 515, 517—554 (1978). *But see Science and the Citizen: Creation Compromised*, Scientific Am., Feb. 1973, at 46—47; Moore, *supra* note 153.

[156] No. S577-0139 (Super. Ct. Marion Cty, Ind. Apr. 14, 1977), *excerpted in* 45 U.S.L.W. 2530 (May 17, 1977). For a critique of this case, *See* Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 Yale L. J. 515, 516 note 4 (1978). The author argues that Darwin's origin of the species also contains references to "the Creator" and similar religious references, *Id.* at 557 n.208, and that it should not be the intent of the writer or publisher of the text, but the intent of the school official that is critical. While the point is valid, the extent to which religious references are found in an officially adopted text could constitute circumstantial evidence of an intent to establish religious views in the schools.

[157] For a review of states and school districts that require or encourage teaching of creationist theories along with evolutionary theories, *see* Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 Yale L.J. 515, 516 note 8 (1978).

[158] Cary v. Board of Educ., 427 F. Supp. 945, 952 (D. Colo. 1977), *aff'd*, 598 F.2d 535 (10th Cir. 1979). This sentiment was echoed by the seventh circuit in Zykan v. Warsaw Community School Corp., 631 F. 2d 1300 (7th Cir. 1980). *See* note 94, *supra*. (The parties stipulated that the books were not obscene.)

[159] In fact, it is possible that failure to accommodate the constituency may violate the law. *See, e.g.*, Faul v. Superintendent of Educ., 367 So. 2d 1267 (La. App. 1979). A Louisiana law provided for a way for a community to *compel* a local school board to implement a second language program. Parents seeking such a program successfully obtained a court order against a superintendent who refused to do so.

[160] *See, e.g.* Citizens for Parental Rights v. San Mateo County Bd. of Educ., 124 Cal. Rep. 68, 51 Cal. App. 3rd 1 (1975).

[161] *See e.g.* cases cited note 20 *supra*.

[162] *See* Engle v. Vitale, 370 U.S. 421, 423, 430 (1962). The New York Courts upheld the prayer requirement so long as no child was coerced; the Supreme Court struck it down. *See also* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 224—225 (1963).

[163] Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515 (1978). He observes that coercion is a necessary element, *Id.* at 528—30, and argues it is present through pressure from students and teachers. He also notes that instruction in evolutionary theory alone may make it difficult for student adhering to a creationist view to respond to test questions. *Id.* at 538.

[164] Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979). It was inadequate, in plaintiffs' view, to permit them to wear modest clothing as their objection extended to visual and physical contact with members of the opposite sex who were attired immodestly. *Id.* at 272.

[165] Ouimette v. Babbie, 405 F. Supp. 525 (D. Vt. 1975). Note that specific reasons for refusal to take the class were given only after the case was filed. *Id.* at 528.

[166] Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974).

[167] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[168] *See generally* Tinker v. Des Moines Ind. Comm. School Dist., 393 U.S. 503 (1969). Only Black, dissenting, was of the opinion that the public

schools were not a public forum. *Id.* at 517. *See also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (Chatanooga enjoined from refusing access to its municipal theater for production of musical "Hair"); Hague v. CIO, 307 U.S. 496 (1939) (Voiding law against speaking in parks or streets without a permit). *Cf.*, Brashich v. Port Auth. of *New York, 484 F. Supp. 697 (S.D.N.Y. 1979)* (upholding lease of space to private religious groups for chapels at New York City airports). *But see* Lehman v. Shaker Heights, 418 U.S. 298 (1974). The Court upheld a refusal to accept political advertising for buses on grounds that the space made available for commercial advertising was not a public forum. Four justices dissented.

[169] Cass, *First Amendment Access to Government Facilities*, 65 Va. L. Rev. 1287 (1979). Cass concludes that the Court will balance speech and other interests, and that the present public forum doctrine (summarized in the text at note 168) is not entirely satisfactory to aid in this task. *Id.* at 1354. He suggests that the relevant factors include the extent to which a particular use detracts from the forum's generally intended use (giving a family theater as an example), the extent to which the forum is identified as representing the view of a particular entity (a departmental house organ, for example), and the availability of alternatives to the individual seeking to use the forum. If he is correct, reasonable restrictions based upon the unique aspects of a school's needs as a school would pehaps be allowed. For example, permitting students to express views towards religion would not trigger a constitutional requirement to admit outsiders with contrasting views, for admission of outsiders could disrupt the school routine.

[170] 408 U.S. 169 (1972). The school accorded recognition to other politically-oriented groups, such as the Young Republicans and the American Civil Liberties Union. The Court supported the general right of the college to refuse recognition to organizations that adhered to unlawful principles, but held that the record failed to establish that the local SDS Chapter was of this type. The Court found that the exclusion of the SDS was unconstitutional, applying the *Tinker* standard. *Id.* at 192.

[171] The Court said:

> Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected. A college administration may impose a requirement . . . that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of recognition.

Id. at 192—93.

[172] *See, e.g.*, University of Missouri v. Dalton, 456 F. Supp. 985 (W.D. Mo. 1978).

[173] Niemotko v. Maryland, 340 U.S. 268 (1951).

[174] Following *Niemotko* the Court decided a case where city officials permitted religious services in the park but refused access to a Jehovah's witness to give a talk, on grounds that religious services only were permitted under park policy. The court cited *Niemotko* and observed that to some religions, giving a talk was also a service. Fowler v. Rhode Island,

345 U.S. 67 (1953). There was no hint that the court would disapprove the idea of religious service in the parks.

[175] In Brandon v. Board of Educ., 487 F. Supp. 1219 (N.D.N.Y. 1980), *aff'd*, — F.2d — (2nd Cir. 1980) approximately 20 Catholic and Protestant students sought to join together in a voluntary prayer meeting before classes. Judge Neal McCurn reluctantly enjoined the activity, noting that he was "not comfortable with the result in this case, which will preclude a group of sincere young people from gathering together for religious purposes." However, he interpreted Supreme Court and lower court decisions as prohibiting the practice. The second circuit affirmed on grounds that the students' right to free exercise of religion could be exercised elsewhere than in the school. *See also* Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965) (kindergarten students forbidden to recite a grace together before cookies and milk); Trietly v. Board of Educ., 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978) (high school students not permitted to form Bible clubs.)

However, in Chess v. Widmar, No. 80-1048 (8th Cir. Aug. 4, 1980) the state university at Kansas City had barred religious groups from using a university-owned building. The group alleged that the refusal violated their right to free exercise of religion. The University argued that it was compelled to deny them the use of the building under the establishment clause. The eighth circuit upheld the right of the students to hold the services on campus. "It would simply permit students to put their religious ideas and practices in competition with the ideas and practices of other groups."

[176] *See, e.g.*, Meltzer v. Board of Pub. Instr., 548 F.2d 559 (5th Cir. 1977); Goodwin v. Cross County School Dist., 394 F. Supp. 417 (E.D. Ark. 1973); Brown v. Orange County Bd. of Pub. Instruction, 128 So. 2d 181 (Fla. App. 1960). The court voided the practice of allowing Gideons to distribute Bibles in the schools.

[177] See notes 173—176 *supra*.

[178] In Resnick v. East Brunswick Township Bd., 77 N.J. 88, 389 A.2d 944 (1978), a New Jersey School Board determined to allow religious groups to use its buildings after hours, upon payment of a fee to cover the district's costs. A majority ruling from the state supreme court upheld the practice. The majority applied the three-prong test developed by the Supreme Court, and held that the legislative purpose was secular in that the state law sought to enhance the public use of school properties for the benefit of all residents; that the primary effect was to aid all nonprofit groups, and there was essentially no public expense involved and little administrative burden, avoiding any fatal church/state entanglement. The dissenting justices argued that religious groups received a direct benefit in that the fee charged was significantly less than the fair market value of a lease of the premises used. *Id.* at 130, 389 A.2d at 965.

But c.f., Americans United for Separation of Church and State v. Porter, 485 F. Supp. 432 (W.D. Mich. 1980). A federal court in Michigan enjoined the practice of the Traverse City, Michigan School District of leasing a part of a parochial school as an "annex" ostensibly open to all public school students but in practice utilized primarily by parochial school students. Note the state supreme court had upheld "shared time." Traverse City School District v. Attorney General, 185 N.W. 2d 8 (1971).

[179] For this reason, if for no other, teachers should be required to take a course in constitutional law as part of their training.

Appendix
Legal "Do's and Don'ts" for State Policymakers Seeking to Provide Moral Instruction in the Public Schools

The following list of "Do's" and "Don'ts" presents a simplified condensation of some of the practical applications of the material discussed in this booklet. Because they are intended for quick reference, they may seem too simplistic or narrow for a particular problem. However, the reader desiring greater depth of analysis and explanations for these guidelines can use the parenthetical page references to the detailed discussion in the main part of the booklet. The reader is urged to do so, as many of these precepts are based on the legal analysis of the author.

Except where otherwise indicated, the "Do's" describe what appears legally permissible and not necessarily what is desirable educationally. These policy decisions are left to the policymakers consulting this booklet.

Do's	Don'ts
Base decisions affecting curriculum on education goals.	Base such decisions on religious preference. (pp. 9-11, 13-14, 27-36)
Eliminate courses because they are underattended, outdated, of low priority to students' ultimate needs, and for similar reasons (pp. 25-26), *if policymakers feel a need to eliminate some courses.*	Eliminate courses because the content conflicts with the religious belief of any group or individual. (pp. 13-14)
Include in the program a moment of silence, excerpts from important national documents such as the Declaration of Independence or the Bill of Rights, or excerpts from speeches and statements of famous Americans, *if policymakers determine that there is an education or other secular goal to be served by such requirements.* (pp. 28-29, 32)	Require prayer or other religious practice in the program, for that is an unconstitutional establishment of religion. (pp. 9-11, 28-29)
Excuse students from a requirement if engaging in an activity offends that student's religious belief or conscience (pp. 6, 8-9, 9-10), unless excusal would defeat an important education goal. (See the Supreme Court guidelines at pp. 41-42.)	Expect that excusal from a requirement to engage in some religious practice will save that requirement from judicial scrutiny. Excusal is valid only to provide relief to those who object to valid (secular) program goals. (pp. 33, 41)

Permit student expression on a wide variety of issues, making the public schools a "marketplace of ideas." (pp. 4-5, 27, 42-44)	Discipline students for the expression of a view or opinion, even if it is unpopular, causes resentment or is critical of the school. (pp. 5-6)
Discipline students for causing a disruption in the school or for violating reasonable rules as to the time, place or manner of expressing views, *wherever public officials feel discipline would be desirable educationally.* (pp. 5-7)	Discipline the student who obeys the rules and peacefully expresses an unpopular opinion; discipline the disruptive student. (pp. 5-6)
Eliminate obscene material from the program, *wherever policymakers believe that doing so is desirable.* (p. 14)	Utilize an overly broad definition of obscenity; don't permit the anti-obscenity policy to intrude upon speech that is protected under the first amendment. (pp. 14-16)
Correct and criticize students' use of language that is in poor taste or vulgar, *wherever policymakers believe doing so is valid educationally.* (p. 41)	Discipline a student for using language that is in poor taste or vulgar if doing so would deprive the student of the opportunity to express a view. (pp. 5-6, 14-16)
Discipline students for uttering obscenities, defamatory statements, untrue statements calculated to cause a disruption (such as "school is closed today," or "fire!"), *if that is deemed desirable educationally.* (pp. 4, 22)	Fail to narrowly define what is obscene, defamatory or disruptive in the policy, taking care not to restrict expression of ideas through a restriction of these unprotected utterances. (pp. 14-16)
Select texts and library books based on judgments about budget, price, education value, literary and scholarly merit and similar reasons, even if this means other materials will not be selected. (pp. 22-23)	Refuse to include a text or library book in the program simply because of an ideological disagreement with the author's views or other disagreement with the author's ideas. (pp. 16-22)
Review texts and library books periodically and eliminate those that no longer serve the needs of the school system. Eliminate library books if they are out-of-date or in low demand (and shelf space is needed), *if such decisions are necessary for the program.* (pp. 16-19, 19-22)	Eliminate texts from courses or remove books from the library because of a disagreement with content. (pp. 16-22)

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Include religious material in the program for secular purposes, such as instruction in history, philosophy and similar goals, *wherever deemed appropriate educationally.* (pp. 27, 29, 30-35)	Include religious material if for the purpose of fostering a particular religious view. (pp. 27-35)
When including sectarian material in the education program, do (1) select teachers for their education qualifications and not for their religious views or affiliation; (2) present a variety of sectarian and secular materials together or a variety of commentaries on a work; (3) foster critical discussion and/or emphasize the historical, cultural or philosophical value of the work. (These requirements reflect judicial decisions discussed at pp. 34-35.)	Include in the program secular or sectarian material solely because a community group wants it included to satisfy their religious preferences. (Scientific Creationism, even if viewed as a secular subject, should not be included in the program because it is preferred by some religious groups; it could be included if there are education reasons. (pp. 35-36)
Tolerate the religious views of students and teachers. (p. 9-12, 42-44)	Provide official support or repression of such views. (pp. 9-12, 13-14, 44)
Tolerate the nondisruptive religious practices of students in school. (p. 9-12, 42-44)	Encourage religious practices. (pp. 9-12, 28-29)
Tolerate the agnostic or atheistic views of students. (p. 9-12, 44)	Encourage such views. (pp. 9-12, 44)
Teach *about* religion, if education policymakers see this as a valid goal. (p. 9-12, 30-35)	Encourage or require religious *practice* in the public schools. (pp. 9-12, 28-29)

The Education Commission of the States is a nonprofit organization formed by interstate compact in 1966. Forty-eight states, American Samoa, Puerto Rico and the Virgin Islands are now members. Its goal is to further a working relationship among governors, state legislators and educators for the improvement of education. This report is an outcome of one of many commission undertakings at all levels of education. The commission offices are located at Suite 300, 1860 Lincoln Street, Denver, Colorado 80295.

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